

No. 11320

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

POPE & TALBOT, INC., a corporation,  
Appellant,  
vs.

GUERNSEY-WESTBROOK COMPANY,  
a corporation,  
Appellee.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Southern Division

**FILED**

JUN 7 - 1946

PAUL P. O'BRIEN,  
CLERK



No. 11320

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

POPE & TALBOT, INC., a corporation,  
Appellant,

vs.

GUERNSEY-WESTBROOK COMPANY,  
a corporation,  
Appellee.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Southern Division



## INDEX

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

|  | PAGE |
|--|------|
| Amended Judgment .....   | 57   |
| Answer .....   | 7    |
| Appeal:  |      |
| Bond Costs on .....  | 65   |
| Certificate of Clerk to Transcript of Record on .....                  | 71   |
| Notice of .....  | 58   |
| Statement of Points Upon Which Appellant Intends to Rely (DC).....     | 59   |
| Stipulation for Consolidation of Cases on (CCA) .....                  | 138  |
| Statement of Points Upon Which Appellant Intends to Rely on (CCA)..... | 137  |
| Bond for Costs on Appeal .....   | 65   |
| Certificate of Clerk to Transcript of Record on Appeal .....           | 71   |
| Complaint for Money Withheld .....                                     | 2    |
| Designation of Portions of Record on Appeal (DC) .....                 | 70   |
| Findings of Fact and Conclusions of Law.....                           | 47   |

| INDEX   | PAGE |
|---|------|
| Judgment .....  | 56   |
| Memorandum Opinion and Order for Judgment   | 31   |
| Names and Addresses of Attorneys of Record..  | 1    |
| Notice of Appeal .....  | 58   |
| Pre-Trial Order .....   | 21   |
| Statement of Points Upon Which Appellant<br>Intends to Rely on Appeal (DC) .....  | 59   |
| Statement of Points on Upon Which Appellant<br>Intends to Rely on Appeal (CCA).....   | 137  |
| Stipulation and Order for Transmission of<br>Original Transcript of Testimony and Orig-<br>inal Exhibits (DC) .....             | 68   |
| Stipulation for Pre-Trial Order.....  | 16   |
| Stipulation for Consolidation of Cases on Ap-<br>peal (CCA) .....   | 138  |
| Stipulation that Original Exhibits may be Con-<br>sidered in Their Original Form Without Ne-<br>cessity of Printing (CCA) ..... | 139  |
| Transcript of Testimony .....   | 73   |
| Exhibits for Defendant and Respondent:  |      |
| 1-A to 1-G, inclusive—Introduced in evi-<br>dence .....   | 92   |
| 2—Introduced in evidence .....  | 118  |
| 3—Introduced in evidence .....  | 121  |

## INDEX

## PAGE

## Witnesses for Respondent and Defendant:

## Hays, Walter G.

|                 |     |
|-----------------|-----|
| —direct .....   | 128 |
| —cross .....    | 131 |
| —redirect ..... | 131 |
| —recross .....  | 132 |

## Kendrick, George

|                          |     |
|--------------------------|-----|
| —direct .....            | 112 |
| —direct (recalled) ..... | 134 |
| —cross .....             | 124 |

## Lunny, Joseph A.

|                          |     |
|--------------------------|-----|
| —direct .....            | 86  |
| —direct (recalled) ..... | 125 |
| —cross .....             | 103 |
| —redirect .....          | 108 |



NAMES AND ADDRESSES OF ATTORNEYS

EDWARD D. RANSOM,

LILLICK, GEARY, OLSON & CHARLES,

311 California St., San Francisco.

Attorneys for Appellant.

FARNHAM P. GRIFFITHS,

McCUTCHEN, THOMAS, MATTHEW,

GRIFFITHS & GREENE,

1400 Balfour Bldg., San Francisco,

Attorneys for Appellee.

In the District Court of the United States for  
the Northern District of California, Southern  
Division

No. 23058-S

GUERNSEY-WESTBROOK COMPANY,  
a corporation,

Plaintiff,

vs.

POPE & TALBOT, INC., a corporation,  
Defendant.

### COMPLAINT FOR MONEY WITHHELD

Plaintiff complains of defendant and for cause  
of action alleges:

#### I.

Plaintiff was at all times herein mentioned, and  
it now is, a corporation organized and existing under  
and by virtue of the laws of the State of Connecticut.  
Defendant was at all times herein mentioned, and  
it now is, a corporation organized and existing under  
and by virtue of the laws of the State of California.  
This is a suit of a civil nature at common law where  
the matter in controversy, inclusive of interest and  
costs, exceeds the sum of \$3,000.00. [1\*]

#### II.

Prior to December 13, 1941, plaintiff agreed to  
buy from defendant and defendant agreed to sell to  
plaintiff, a quantity of Douglas fir lumber, amount-

---

\* Page numbering appearing at foot of page of original certified  
Transcript of Record.

ing in all to approximately 664,991 feet net board measure to be shipped by steamer by defendant from St. Helens, Oregon, to Brooklyn, New York. By the terms of the said agreement of sale the purchase price of said lumber included the ocean freight, but the portion of said purchase price equivalent to the ocean freight on said lumber from St. Helens, Oregon, to Brooklyn, New York, was to be paid by plaintiff only on the arrival of the steamer at destination. The balance of the purchase price, less a discount of 2%, was to be paid on presentation of a sight draft with customary shipping documents attached, including a negotiable bill of lading to the order of Marine Midland Trust Company of New York.

### III.

On or about December 13, 1941, defendant caused said lumber to be loaded on board its steamship *Absaroka*, and on said date defendant issued various bills of lading covering said shipment, wherein defendant was the shipper and whereby said lumber was consigned to the order of Marine Midland Trust Company of New York, notify the Guernsey-Westbrook Company at Hartford, Connecticut. In due course said bills of lading, with draft attached in an amount equivalent to 98% of the invoice price less the ocean freight, were presented to plaintiff at Hartford, Connecticut, and said drafts were paid by, and said bills of lading were delivered to, plaintiff. In and by said bills of lading the said lumber was to be transported by defendant on defendant's said steamship *Absaroka* from St. Helens, Oregon,

[2] unto the port of Brooklyn, N. Y., via the Panama Canal, and the freight on said lumber was to be collected at destination. On or about December 18, 1941, said Steamer Absaroka, with plaintiff's lumber on board, sailed from the said port of St. Helens, Oregon.

#### IV.

In the course of the voyage from St. Helens, Oregon, to Brooklyn, N. Y., and on December 24, 1941, when the vessel was in the vicinity of Point Fermin, California, the said Absaroka was struck by a torpedo presumably discharged by a Japanese submarine. The torpedo struck said vessel in the vicinity of No. 5 hold and tore a large hole in the shell of the ship. Said vessel was towed into the port of Los Angeles, California, and after the cargo remaining on board was unloaded, was placed in drydock for survey. Thereafter a contract for the repairs to the damage sustained by said vessel was entered into between defendant and Bethlehem Steel Company.

#### V.

On or about February 5, 1942, defendant notified plaintiff that it intended to, and did, abandon the voyage at Los Angeles, California. Plaintiff protested against said abandonment and advised defendant that plaintiff was willing to have its said lumber go forward on said Absaroka when the repairs to said vessel were completed, and plaintiff demanded that defendant carry plaintiff's lumber to destination. Defendant refused to do so and proposed to sell the entire lumber cargo of said vessel

at the port of Los Angeles, including plaintiff's said lumber. At said time it was difficult, if not impossible, to obtain space on other intercoastal vessels, and the cost of transporting said lumber by rail to destination would have been prohibitive. Defendant did not notify plaintiff [3] that it proposed to demand full freight to destination on said lumber until after the said voyage was abandoned. Plaintiff denied that any freight had been earned on said lumber. After considerable negotiation, in order to minimize damages, plaintiff consented to the sale of said lumber at Los Angeles, but without prejudice to its contention that the abandonment of said voyage was unjustified, and without prejudice to its contention that no freight was due.

## VI.

The said cargo of lumber, including plaintiff's lumber, was ultimately sold by defendant at Los Angeles, California, for the account of the owners of said cargo, except for a quantity which was requisitioned by the United States Army and except for a part of the lumber which was damaged or lost as a result of the torpedoing.

On or about January 11, 1943, a part of the proceeds of the sale of plaintiff's lumber, less certain general average and salvage charges and other expenses, was tendered by defendant to plaintiff, but in tendering the said portion of the proceeds of the sale of plaintiff's lumber, despite the fact that under the terms of the contract of sale freight was not to be paid unless and until the vessel arrived at destina-

tion, and despite the non-performance of the contract of affreightment, defendant wrongfully withheld from plaintiff the sum of \$10,543.85, asserting that said sum was due for freight on said lumber.

## VII.

At all times herein mentioned, plaintiff has denied, and does now deny, that any freight was earned by or due or payable to defendant and demanded payment of the freight withheld by defendant, but defendant failed and refused and still [4] fails and refuses to return said freight or any part thereof, and the whole amount of \$10,543.85 with interest from January 11, 1943, at 7% per annum, is now due and owing from defendant to plaintiff.

Wherefore, Plaintiff Prays Judgment against defendant for \$10,543.85, together with interest thereon at 7% per annum from January 11, 1943, until paid, for its costs of suit herein and for such other and further relief as may be appropriate in the premises.

FARNHAM P. GRIFFITHS,

McCUTCHEN, THOMAS, MATTHEW,

GRIFFITHS & GREENE,

Attorneys for Libellant.

[Endorsed]: Filed Dec. 23, 1943. [5]

[Title of District Court and Cause.]

### ANSWER

Defendant, answering unto the allegations of the complaint herein, admits, denies and alleges as follows:

#### I.

Defendant has no information or belief with which to enable it to answer the allegations of the first sentence of paragraph I [6] of the complaint, and upon such ground denies each and all of said allegations. Admits the remaining allegations of said paragraph.

#### II.

Admits the allegations contained in the first and the last sentences of paragraph II of the complaint. Denies each and all of the remaining allegations of said paragraph, except that it admits that, by the terms of the said agreement of sale, the purchase price of said lumber included the ocean freight.

#### III.

Admits the allegations of paragraph III of the complaint.

#### IV.

Admits the allegations of paragraph IV of the complaint.

#### V.

Admits the allegations of the first sentence of paragraph V of the complaint. Admits that plaintiff protested the abandonment of the voyage. Denies that plaintiff advised defendant that plaintiff was

willing to have the lumber referred to in the complaint, or any of it, go forward on said Absaroka when the repairs to said vessel were completed, or at any time; denies that plaintiff demanded that defendant carry plaintiff's lumber, or any part thereof, to destination. Admits that defendant declined to carry said lumber to destination. Denies that defendant proposed to sell the entire lumber cargo of said vessel, or any part thereof, at the port of Los Angeles, or elsewhere, including plaintiff's said lumber, or any part thereof, and in this connection alleges that defendant advised plaintiff that said voyage was being terminated at San Pedro, California, pursuant to the provisions of the bill of lading; that plaintiff's lumber was being discharged from the vessel, and that the disposition of said lumber after such [7] discharge was subject to plaintiff's orders. In this connection defendant alleges that pursuant to the request of plaintiff and other shippers and owners of lumber carried on said vessel, it did sell, for the account of plaintiff and other shippers and owners of lumber that part of the lumber which was not lost but was discharged from the vessel at San Pedro, as aforesaid. Denies each and all of the remaining allegations of paragraph V of the complaint except that it admits that at the time referred to in paragraph V of the complaint it was difficult, if not impossible to obtain space on other intercoastal vessels. Denies that the cost of transporting said or any lumber by rail or otherwise to destination would have been prohibitive. Denies that defendant did not notify plaintiff

that it proposed to demand full freight to destination on said lumber until after the said voyage was abandoned. Admits the remaining allegations of said paragraph V of the complaint.

## VI.

Admits the allegations of the first sentence of paragraph VI of the complaint. Denies each and all of the remaining allegations of paragraph VI of the complaint except that it admits that on or about January 11, 1943, a part of the proceeds of the sale of plaintiff's lumber, less certain general average and salvage charges and other expenses, was paid by defendant to plaintiff, and in this connection alleges that all moneys due from defendant to plaintiff were paid to plaintiff on or about January 11, 1943.

## VII.

Defendant denies each and all the allegations of paragraph VII of the complaint, except that it admits that plaintiff has denied and does in said complaint deny that any freight was earned by, or due or payable to defendant, and demanded payment [8] of the freight withheld by defendant, and that defendant failed and refused, and still fails and refuses, to return said freight or any part thereof, and in this connection alleges that this defendant is entitled to the whole of said freight.

\* \* \* \*

Further answering the complaint herein, and as a Second Separate and Affirmative Defense thereto, defendant alleges as follows:

The bill of lading issued for the shipment referred to in the complaint contains, among others, the following provisions:

“2. Provided due diligence shall have been exercised to make the vessel in all respects seaworthy and properly manned, equipped and supplied, the Carrier shall not be liable, as Carrier or otherwise, for any loss, damage, delay or default, whether occurring during transit or before, or after, or during, or while awaiting loading, transshipment, discharge, delivery or other disposition of the goods, \* \* \* by enemies, pirates, robbers or thieves; by arrest or restraint of Government, princes, rulers or peoples; by prolongation of the voyage; by detention, or accidental delay; \* \* \*.”

Due diligence was exercised to make the said vessel in all respects seaworthy and properly manned, equipped and supplied.

Any loss sustained by plaintiff was not caused or contributed to by any fault or neglect on the part of the defendant or on the part of the vessel, but was the result of causes excepted in the bill of lading provisions hereinabove set forth.

A true copy of the said bill of lading is hereto annexed marked Exhibit “A” and is hereby made a part of this answer.

\* \* \* \*

Further answering the complaint herein, and as a Third Separate and Affirmative Defense thereto, defendant alleges as follows:

The said bill of lading contains, among others, the [9] following provision:

“3. Full freight to destination \* \* \* at declared rates (unless otherwise agreed) and all advance charges against the Goods are due and payable to the Carrier at its option upon receipt of the Goods by the latter; and the same \* \* \* shall be deemed fully earned and due and payable to the Carrier at any stage, before or after loading, of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid) Goods or vessel lost or not lost; and the Carrier shall have a lien on the Goods or any part or proceeds for the whole thereof; and the Shipper, Consignee and/or assigns shall be jointly and severally liable therefor, and notwithstanding that any lien therefor has been surrendered. Full freight and charges shall be payable, and so paid, on all damaged and unsound Goods. \* \* \*”

As alleged in the complaint, the steamship *Absaroka* was torpedoed by a Japanese submarine on December 24, 1941. Pursuant to provisions of the bill of lading, the voyage of the *Absaroka* was terminated at San Pedro, to which port she was towed in a sinking condition; that her cargo, including the lumber cargo referred to in the complaint herein, was discharged at said port, and defendant requested instructions as to the disposition of said cargo from plaintiff; that pursuant to the above-quoted provisions of the bill of lading, the full freight on said shipment of lumber was fully

earned, and defendant was entitled to receive and retain the same.

\* \* \* \*

Further answering the complaint herein, and as a Fourth Separate and Affirmative Defense thereto, defendant alleges as follows:

The said bill of lading contains, among others, the following provisions:

“7. \* \* \* If because of conditions, actual or reported, at or near or between the port of loading and/or the port of discharge, such as war, hostilities, insurrection, civil commotion, blockade, interdiction, or any regulations of any government, or on account of conditions of the sea or weather, or epidemic, disease, quarantine, or congestion of wharves, lack of discharging facilities, [10] riots, lockouts, stoppage of labor, strikes or labor disturbances from whatsoever cause, whether partial or general, or of the Carrier’s employees or others, or any condition whether of like nature to those named or otherwise and whether existing or anticipated, which may cause the Master to decide that it is unsafe or impracticable to proceed from or to any port or to load or discharge the goods there, or that the loading or discharging or carriage of the cargo is likely to be delayed, or that clearance from or entry to the port of loading or discharge, or communication therewith, may render the vessel liable to quarantine at any subsequent port, then the vessel may, at its option, retain the goods on board for delivery on return to the said port, and/or store the goods ashore or on lighters

or on craft at the port or place where the vessel then is or at the nearest practicable place, and/or store the goods ashore or in lighters or in craft at the port of destination or the nearest practicable place thereto or at the port nearest thereto to which the vessel is bound, and/or forward the goods from any place and by any route to or toward the port of destination by any carrier or conveyance and/or refuse to commence and/or continue loading, transshipment or forwarding operations, and/or replace on dock, lighters or elsewhere, shipments of goods previously loaded in whole or in part; all at the risk and expense of the goods, their shipper, owner and consignee. Any such disposition of the goods shall constitute a final delivery thereof, terminating all responsibility of the Carrier therefor, but the Carrier shall retain a lien on the goods for all proper charges and expenses including such charges and expenses as are incurred in the retention, storage, forwarding, replacing or other disposition of the goods as aforesaid. \* \* \*

Pursuant to the aforementioned provisions of the bill of lading, the cargo of said vessel, including the shipment referred to in the complaint, was discharged at San Pedro, and said disposition of the goods under the provisions of the bill of lading above quoted constituted a final delivery thereof, terminating all responsibility of the defendant therefor.

\* \* \* \*

Furthering answering the complaint herein, and

as a Fifth Separate and Affirmative Defense thereto, defendant alleges as follows:

The said bill of lading contains, among others, the following provisions: [11]

“4. Note Particularly: Written notice of claim for loss, damage, shortage, conversion, misdelivery, failure or delay in delivery, of any cargo covered by this bill of lading must be given to the Carrier at its office or agency at port of destination by or in behalf of shippers, consignees, or owners of the cargo, or other parties in interest, within 48 hours after removal of said goods from the wharf or vessel, and full particulars of all claims (disclosing the nature and extent thereof) for cargo covered by this bill of lading must be presented in writing to the Carrier at its office or agency at the port of destination by or in behalf of shippers, consignees, or owners of the cargo, or other parties in interest, within 10 days after the removal of said goods from the wharf or vessel; or if the vessel or cargo be lost or stranded within 10 days from date of notice of any such loss or stranding, and the earliest newspaper mention of loss or stranding shall be and fix the date of such notice; and if any claim and/or notice of claim be not so presented as provided for in this paragraph, said claim shall be, and by every court be held to have been, waived and released, and to be abandoned and barred. No suit or action on any claim, or to recover for any alleged loss, damage, shortage, conversion, misdelivery, failure or delay in delivery of the whole or any part of the cargo covered by this bill

of lading shall be maintained unless instituted within 90 days from and after the date that written notice of claim is required to be presented as above stated; and every suit or action of whatsoever description not commenced within said 90 days as aforesaid shall be, and by every court held to have been, waived and released, and to be abandoned and barred, and all claims and demands against the Carrier shall be held to have been waived and released by the shippers, consignees, and owners of the cargo, and by any all other parties in interest. Nothing shall be deemed to be a waiver of the provisions of this paragraph except an express written waiver therefor signed by the Carrier.”

Defendant alleges on information and belief that written notice of claim was not given to the carrier within 48 hours after removal of said goods from the wharf or vessel, nor was any statement of particulars presented in writing to the carrier within ten days after the removal of said goods from the wharf or vessel; and suit to recover upon the alleged claim was not brought within ninety days after the giving of written notice in accordance with the terms of the bill of lading; and by reason of the premises [12] plaintiff is barred from recovering herein.

Wherefore, defendant prays that the complaint herein be dismissed with costs.

/s/ LILICK, GEARY, OLSON &  
CHARLES,

Attorneys for Defendant.

[Endorsed]: Filed April 27, 1944. [13]

[Title of District Court and Cause.]

### STIPULATION FOR PRE-TRIAL ORDER

The parties hereto, through their counsel, stipulate and agree that a pre-trial order may be entered as follows:

1. That the bill of lading attached hereto as Exhibit 1 is one of the bills of lading which were issued for the shipments [14] referred to in the complaint herein, and like bills of lading were issued covering all the shipments mentioned in said complaint, and all of same are deemed to be admitted in evidence.

2. That the attached copy of invoice designated Exhibit 2 is a true copy of one of the original invoices issued in connection with the shipments referred to in the complaint herein, and like invoices were issued covering all of the shipments mentioned in said complaint, and all of same are deemed to be admitted in evidence.

3. That the attached copy of wire dated April 14, 1942, addressed to McCormick Steamship Co., designated Exhibit 3 herein, is a true copy of a telegram sent by War Shipping Administration to McCormick Steamship Company on said date, and said copy may be introduced in evidence in lieu of the original telegram without further identification or the requiring of further proof that the wire was sent by the War Shipping Administration and received by McCormick Steamship Company on April 14, 1942.

4. That the attached copy of order designated Exhibit 4 is a true copy of one of the orders placed by plaintiff with defendant covering one of the ship-

ments referred to in the complaint herein, and like orders were placed by plaintiff with defendant covering all of the shipments mentioned in said complaint, and all of same are deemed to be admitted in evidence.

5. That the attached acceptance of order designated Exhibit 5 is one of the original acceptances by defendant of the orders in connection with the shipments referred to in the complaint herein and like acceptances of orders were made by defendant covering all of the shipments mentioned in said complaint, and all of the same are deemed to be admitted in evidence.

6. That the following facts are agreed to: The steamship [15] Absaroka sailed from St. Helens, Oregon, on December 18, 1941, bound for the ports of Brooklyn, New York; Port Newark, New Jersey; and Philadelphia, Pennsylvania, carrying a full cargo of lumber. The entire cargo was loaded at St. Helens, Oregon.

On December 24, 1941, the steamship Absaroka was struck on her starboard quarter by a torpedo from a Japanese submarine when approximately five miles off Point Fermin, California. The torpedo struck the vessel between the No. 4 and 5 holds approximately at the level of the 'tween deck. The explosion tore a hole in the shell of the ship approximately fifteen feet by twenty feet in size, blew off a small part of the after deckload of lumber, and caused the vessel to settle heavily by the stern with an 18° list to starboard. A general alarm was sounded, SOS signals were flashed by radio and the

master immediately ordered the crew to abandon ship. Coast Guard cutters and privately owned tugs went to the assistance of the Absaroka which commenced to tow the vessel towards Los Angeles Harbor.

The Absaroka was towed by six tugs inside the San Pedro breakwater and was there beached on Cabrillo Beach. Salvage operations were carried out, the lumber cargo not lost was discharged, the discharge being completed on January 7, 1942. Some of the lumber was stained by fuel oil leaking from punctured double-bottom tanks. After cleaning oil and debris from the No. 5 hold and the machinery space, the Absaroka was placed on dry dock at the plant of Bethlehem Steel Company on January 19, 1942. Upon completion of survey of the vessel's damages, repair specifications were drawn and a repair contract was negotiated with the Bethlehem Steel Company for an agreed price of \$310,000, the tender being dated January 22, 1942. Additional damages were discovered during the performance of repairs and a supplementary specification covering [16] these damages was prepared and submitted to the Bethlehem Steel Company, who submitted a tender in the amount of \$14,827 under dated of May 7, 1942, to cover this additional work. Repairs were completed and a satisfactory dock trial was run on May 9, 1942.

The Absaroka was in all respects in seaworthy condition and properly manned, equipped and supplied on sailing from St. Helens, and the cargo was properly stowed. The Absaroka left St. Helens

under sailing orders of the United States Navy authorizing the vessel to proceed. She was to call at Los Angeles for fueling. During the voyage, and on or about December 20, the master received orders from the Commandant of the Twelfth Naval District to put into San Francisco, these orders being issued after knowledge had been received of the presence of Japanese submarines on the Pacific Coast. The master subsequently, on December 21st, received further Navy orders to disregard the instructions to put into San Francisco.

As a result of the torpedoing, salvage and other general average expenses were incurred, as shown by General and Particular average Statement prepared by Marsh & McLennan. The total of General Average disbursements was \$154,621.95, the total of Particular Average disbursements was \$345,909.54, and the total of special damages on cargo, \$13,258.31.

The total cost of repairs (Particular Average disbursement) made by Bethlehem Steel Company was \$326,921.30.

Plaintiff was at all times mentioned in the complaint and now is a corporation organized and existing under and by virtue of the laws of the State of Connecticut and was the purchaser of the lumber mentioned in the complaint and was the owner thereof at the time of the events mentioned in the complaint.

Pope & Talbot, Inc., defendant, had a written open policy [17] of marine insurance covering freight. Under the marine policy, Pope & Talbot, Inc., was required to make a declaration of the amount of freight at risk on a particular vessel and pay prem-

iums thereon. Pope & Talbot, Inc., declared the freight under the marine policy on all cargo on the Absaroka on this voyage. Pope & Talbot, Inc., also secured an insurance binder purporting to be in the amount of \$85,000, and to cover freight on the cargo on the Absaroka on this voyage against war risk. The insurance company is contesting its obligations under said binder. The total freight for all cargo on said vessel on this voyage was approximately \$80,000. Photostatic copy of such binder is attached hereto marked Exhibit 6 and said photostatic copy may be introduced in evidence in lieu of the original binder and without further identification or proof.

The amount of freight for all the shipments mentioned in the complaint is correctly computed at \$10,543.85.

7. Counsel for the parties desire to leave open the other questions of fact and issues in the case and will endeavor to settle as many of them as possible by further agreements and stipulations.

Dated October 30, 1944.

FARNHAM P. GRIFFITHS,  
McCUTCHEN, THOMAS, MATTHEW,  
GRIFFITHS & GREENE,

Attorneys for Plaintiff.

ALLAN E. CHARLES,  
LILLYCK, GEARY, OLSON &  
CHARLES,

Attorneys for Defendant.

It is so ordered.

A. F. ST. SURE,

United States District Judge.

[Endorsed]: Filed Oct. 30, 1944. [18]

[Title of District Court and Cause.]

## PRE-TRIAL ORDER

### I.

Plaintiff Guernsey-Westbrook Company was at all times herein mentioned and is now a corporation organized and existing under and by virtue of the laws of the State of Connecticut, and was the purchaser of the lumber hereinafter mentioned and was the owner thereof at the time of the events hereinafter mentioned. Defendant Pope & Talbot, Inc., was at all times herein mentioned and it now is a corporation organized and existing under and by virtue of the laws of the State of California, and the owner and operator of the steamship Absaroka. This is a suit of a civil [19] nature at common law where the matter in controversy, inclusive of interest and costs, exceeds the sum of \$3,000.

### II.

Prior to December 13, 1941, plaintiff agreed to buy from defendant and defendant agreed to sell to plaintiff a quantity of Douglas fir lumber amounting in all to approximately 664,991 feet net board measure to be shipped by steamer by defendant from St. Helens, Oregon, to Brooklyn, New York. By the terms of said agreement of sale the purchase price of said lumber included the ocean freight from St. Helens, Oregon, to Brooklyn, New York, at the rate of \$16.00 per thousand board feet, said \$16.00 per thousand board feet payable upon arrival of lumber at destination.

That the copy of the order attached to the stipulation of the parties filed herein on October 30, 1944, and designated Exhibit 4 therein, is a true copy of one of the orders placed by plaintiff with defendant covering the purchase of a part of the above-mentioned lumber and like orders were placed by plaintiff with defendant covering all of the purchases of said above-mentioned lumber.

That the acceptance of order attached to said stipulation filed herein on October 30, 1944, and designated therein Exhibit 5, is one of the original acceptances by defendant of the orders of plaintiff for the purchase of a portion of the lumber above-mentioned and like acceptances of orders were made and executed by defendant covering all of the purchases of the above-mentioned lumber.

The copy of the invoice attached to said stipulation and designated therein Exhibit 2, is a true copy of one of the original invoices issued by defendant to plaintiff covering the purchase of [20] a portion of the above-mentioned lumber and like invoices were issued by defendant to plaintiff covering all of the purchases of said lumber.

All of said Exhibits above-mentioned, numbered 4, 5 and 2, attached to said stipulation are incorporated herein with like effect as though set forth herein in full.

The above-mentioned orders and acceptances set forth the terms of the purchase of all of said lumber above-mentioned by plaintiff from defendant.

The purchase price, other than the portion thereof equivalent to the ocean freight, less a discount of 2 percent, was to be paid on presentation of a sight draft with customary shipping documents attached, including a negotiable bill of lading to the order of Marine Midland Trust Company of New York.

### III.

On or about December 13, 1941, defendant caused said lumber to be loaded on board its steamship *Absaroka*, and on said date defendant issued various bills of lading covering said shipment, wherein defendant was the shipper and whereby said lumber was consigned to the order of Marine Midland Trust Company of New York, notify the Guernsey-Westbrook Company at Hartford, Connecticut. In due course said bills of lading, with draft attached in an amount equivalent to 98 percent of the invoice price, less the ocean freight, were presented to plaintiff at Hartford, Connecticut, and said drafts were paid by, and said bills of lading were delivered to plaintiff. In and by said bills of lading the said lumber was to be transported by defendant on defendant's said steamship *Absaroka* from St. Helens, Oregon, unto the port of Brooklyn, N. Y., via the Panama Canal, and the freight on said lumber was to be [21] collected at destination. On or about December 18, 1941, said steamer *Absaroka*, with plaintiff's lumber on board, sailed from the said port of St. Helens, Oregon.

The bill of lading attached to said stipulation filed herein October 30, 1944, and designated therein Ex-

hibit 1, is one of the bills of lading which were issued for the above-mentioned shipments of lumber and like bills of lading were issued covering all of the shipments of all of said lumber, and said bill of lading is hereby referred to and incorporated herein with like effect as though herein set forth in full.

#### IV.

The steamship Absaroka sailed from St. Helens, Oregon, on December 18, 1941, bound for the ports of Brooklyn, New York; Port Newark, New Jersey, and Philadelphia, Pennsylvania, carrying a full cargo of lumber. The entire cargo was loaded at St. Helens, Oregon.

On December 24, 1941, the steamship Absaroka was struck on her starboard quarter by a torpedo from a Japanese submarine when approximately five miles off Point Fermin, California. The torpedo struck the vessel between the No. 4 and 5 holds, approximately at the level of the 'tween deck. The explosion tore a hole in the shell of the ship approximately fifteen feet by twenty feet in size, blew off a small part of the after deckload of lumber and caused the vessel to settle heavily by the stern with an 18° list to starboard. A general alarm was sounded, SOS signals were flashed by radio and the master immediately ordered the crew to abandon ship. Coast Guard cutters and privately owned tugs went to the assistance of the Absaroka, which commenced to tow the vessel towards Los Angeles Harbor. [22]

The Absaroka was towed by six tugs inside the

San Pedro breakwater and was there beached on Cabrillo Beach. Salvage operations were carried out, the lumber cargo not lost was discharged, the discharge being completed on January 7, 1942. Some of the lumber was stained by fuel oil leaking from punctured double-bottom tanks. After cleaning oil and debris from the No. 5 hold and the machinery space, the Absaroka was placed on dry dock at the plant of Bethlehem Steel Company on January 19, 1942. Upon completion of survey of the vessel's damages, repair specifications were drawn and a repair contract was negotiated with the Bethlehem Steel Company for an agreed price of \$310,000, the tender being dated January 22, 1942. Additional damages were discovered during the performance of repairs and a supplementary specification covering these damages was prepared and submitted to the Bethlehem Steel Company, who submitted a tender in the amount of \$14,827 under date of May 7, 1942, to cover this additional work. Repairs were completed and a satisfactory dock trial was run on May 9, 1942.

The Absaroka was in all respects in seaworthy condition and properly manned, equipped and supplied on sailing from St. Helens, and the cargo was properly stowed. The Absaroka left St. Helens under sailing orders of the United States Navy authorizing the vessel to proceed. She was to call at Los Angeles for fueling. During the voyage, and on or about December 20, the master received orders from the Commandant of the Twelfth Naval District to put into San Francisco, these orders

being issued after knowledge had been received of the presence of Japanese submarines on the Pacific Coast. The master subsequently, on December 21st, received further Navy orders to disregard the instructions to put into San Francisco. [23]

As a result of the torpedoing, salvage and other general average expenses were incurred, as shown by General and Particular Average Statement prepared by Marsh & McLennan. The total of General Average disbursements was \$154,621.95, the total of Particular Average disbursements was \$345,909.54, and the total of special damages on cargo, \$13,258.31.

The total cost of repairs (Particular Average disbursement) made by Bethlehem Steel Company was \$326,921.30.

## V.

On or about February 5, 1942, defendant notified plaintiff that it intended to abandon the voyage at Los Angeles, California. Plaintiff protested against said abandonment. Defendant declined to carry said lumber to destination. At said time it was difficult, if not impossible, for plaintiff to obtain space for shipment of said lumber on other inter-coastal vessels.

In its notice of the abandonment of said voyage, defendant for the first time mentioned to plaintiff the subject of freight on plaintiff's shipments, notwithstanding the abandonment of the voyage, by stating: "We reserve our lien and right against the freight and other expenses in accordance with

the terms of the bill of lading.” Plaintiff then denied and ever since has denied and does now deny that any freight had been earned on its shipments of said lumber. After the notice of abandonment and after considerable negotiation, in order to minimize damages and because of defendant’s facilities for handling lumber, it was agreed by all parties that the cargo of lumber, including that belonging to plaintiff, should be sold at Los Angeles, but such consent was given by plaintiff without prejudice to its contention that the abandonment of said voyage was unjustified, and without prejudice to its contention that [24] no freight was due. Said cargo of lumber, including plaintiff’s lumber, was ultimately sold by defendant at Los Angeles, California, for the account of the owners of said cargo.

On or about January 11, 1943, the proceeds of the sale of plaintiff’s lumber, less certain general average and salvage charges and other expenses, and less the sum of \$10,543.85 which defendant claimed to be due for freight for said lumber of plaintiff for the voyage from St. Helens, Oregon, to Brooklyn, New York, was tendered by defendant to plaintiff. When said sum of \$10,543.85 was withheld from the proceeds of the sale of said lumber, defendant for the first time presented freight bills to plaintiff. This was the first demand made by defendant upon plaintiff for the actual payment of said freight.

Said sum of \$10,543.85 has not since been paid by defendant to plaintiff and defendant has at all times refused to pay said sum to plaintiff.

## VI.

The copy of the wire dated April 14, 1942, attached to said stipulation filed herein on October 30, 1944, and designated therein Exhibit 3, is a true copy of a telegram sent by War Shipping Administration to McCormick Steamship Company on said date and received by McCormick Steamship Company on said date.

McCormick Steamship Company, a corporation, and McCormick Lumber Company, a corporation, were both absorbed by defendant Pope & Talbot, Inc., and Pope & Talbot, Inc., succeeded to the right and assumed the obligation of McCormick Steamship Company and McCormick Lumber Company.

Possession of said vessel Absaroka was not taken by War Shipping Administration pursuant to said telegram of April [25] 14, 1942, but said vessel was chartered to War Shipping Administration by a Time Charter dated May 9, 1942, for the charter hire of \$4.10 per deadweight ton of 8,538 deadweight tons per month, or \$35,005.80 per month on sailings prior to May 16, 1942, and on sailings on and after May 16, 1942, \$4.35 per deadweight ton per month, or \$37,140.30 per month.

## VII.

Defendant Pope & Talbot, Inc., secured sufficient marine and war risk insurance to cover all freight on all cargo on board said Absaroka on the voyage in question, all of which freight for all cargo on said vessel was approximately \$80,000. The Insurance Company is contesting its obligations under the

war risk insurance on all cargo on the vessel, on grounds not pertinent to the present cases.

### VIII.

The amount of freight for all shipments of plaintiff on said vessel on the voyage in question is correctly computed at \$10,543.85.

The issues presented for determination by the Court on the foregoing statement of facts are as follows:

(1) Whether or not under the terms of the sale and purchase of the lumber by defendant to plaintiff, and in view of the fact that the voyage was not made, and that the lumber was not delivered to its destination at Brooklyn, New York, the plaintiff is entitled to recover that portion of the purchase price, namely \$16.00 per thousand board feet, which was included in the purchase price as the ocean freight from St. Helens, [26] Oregon, to Brooklyn, New York.

(2) Whether under the terms of the bills of lading and other documents issued covering plaintiff's shipments on the vessel Absaroka the defendant is entitled to the freight, although the voyage was not made.

(3) Whether under the terms of the bills of lading defendant is entitled to freight on the lumber shipments of plaintiff, even though the voyage was not made, in view of the circumstances under which the voyage was abandoned.

(4) Whether the defendant is entitled to freight

on the shipments of lumber of the plaintiff, although the voyage was not made, in view of all the circumstances in this case.

The foregoing Pretrial Order is hereby approved by the respective parties hereto:

/s/ FARNHAM P. GRIFFITHS,  
/s/ CHARLES E. FINNEY,  
/s/ McCUTCHEN, MATTHEW, GRIF-  
FITHS & GREENE,  
Attorneys for Plaintiff.

/s/ ALLAN E. CHARLES,  
/s/ LILLICK, GEARY, OLSON &  
CHARLES,  
Attorneys for Defendant.

The foregoing Pretrial Order is hereby made and entered this 27th day of November, 1944.

/s/ A. F. ST. SURE,  
United States District Judge.

(Duly verified.)

(Acknowledgment of Service attached.)

[Endorsed]: Filed Nov. 27, 1944. [28]

In the United States District Court, Northern  
District of California, Southern Division

No. 23058-S

GUERNSEY-WESTBROOK COMPANY,  
a corporation,

Plaintiff,

vs.

POPE & TALBOT, INC., a corporation,  
Defendant.

In Admiralty—No. 23992-R

BLANCHARD LUMBER COMPANY OF  
SEATTLE, a corporation,

Libellant,

vs.

POPE & TALBOT, INC., a corporation,  
Respondent.

MEMORANDUM OPINION AND ORDER  
FOR JUDGMENT

Plaintiff Guernsey-Westbrook Company sues to recover \$10,543.85, and libellant Blanchard Lumber Company sues to recover \$4322.72, constituting freight charges on shipments of lumber on defendant and respondent's vessel, the "Absaroka," on the ground that defendant and respondent [29] failed to deliver the lumber at Brooklyn and at Philadelphia, as provided for in the respective con-

tracts of sale and affreightment. The two actions were tried together. For convenience, plaintiff and libellant will hereinafter be referred to as "plaintiffs" and defendant and respondent as "defendant." The parties stipulated to pre-trial orders setting forth the facts of the cases, and except as hereinafter specified the facts are undisputed.

The Absaroka left Portland on December 18, 1941, in seaworthy condition, carrying shipments of lumber for the account of Guernsey-Westbrook Company and Blanchard Lumber Company, for delivery at Brooklyn and Philadelphia respectively. She was torpedoed off the California coast near Los Angeles on December 24, and was so badly damaged that she would have sunk except for the buoyancy of her lumber cargo. A small part of the cargo was lost overboard, and a portion stained by oil. The Absaroka was towed into San Pedro, and was repaired at a cost of approximately \$327,000. Due to priorities, the repairs could not be completed until May of 1942. Meanwhile, on February 5, 1942, after repairs had been commenced, defendant, over plaintiffs' protest, abandoned the voyage, stating in the notice of abandonment: "We reserve our lien and right against the freight and other expenses in accordance with the terms of the bill of lading." It would have been difficult, if not impossible, for plaintiffs to obtain space for shipment of the lumber on other intercoastal vessels. After the notice of abandonment and considerable negotiation, it was agreed that the lumber should be sold at Los Angeles, [30] without prejudice to

plaintiffs' rights. The lumber was thereafter sold for plaintiffs' account, and the freight moneys which are the subject of the present suits were deducted from the purchase price by defendant.

On April 14, 1942, the War Shipping Administration telegraphed defendant that it required use of the vessel *Absaroka* and requested her delivery after completion of repairs. While possession of the vessel was not taken by the War Shipping Administration pursuant to the telegram, the vessel was chartered to it by a time charter dated May 9, 1942. Since the charter arrangement was offered by the War Shipping Administration as an alternative to the requisitioning of the vessel, it may be said to have had the legal effect of a requisition.

Prior to the commencement of the voyage, defendant secured sufficient marine and war risk insurance to cover all freight and all cargo on board the *Absaroka*, or approximately \$80,000. The insurance company is contesting its obligation under the war risk insurance on all cargo on the vessel, on grounds not pertinent to the present cases.

The issues presented for determination by the court, as set forth in the pre-trial orders, are as follows:

First. With regard to plaintiff *Guernsey-Westbrook Company*, whether or not under the terms of the sale and purchase of the lumber, and in view of the fact that the voyage was not made, and that the lumber was not delivered to its destination at Brooklyn, New York, said plaintiff is entitled to recover

the portion of the purchase price included in the purchase price as ocean freight from St. Helens, Oregon, to Brooklyn, New York. [31]

Second. With regard to both plaintiffs, whether under the terms of the bills of lading and other documents issued covering plaintiffs' shipments on the vessel Absaroka the defendant is entitled to the freight, although the voyage was not made.

Third. With regard to both plaintiffs, whether under the terms of the bills of lading defendant is entitled to freight on the lumber shipments of plaintiff, even though the voyage was not made, in view of the circumstances under which the voyage was abandoned.

Fourth. With regard to both plaintiffs, whether the defendant is entitled to freight on the shipments of lumber of the plaintiffs, although the voyage was not made, in view of all the circumstances of the case.

Defendant claims that it is entitled to the whole amount of the freight, despite the fact that the cargo was not delivered to its destination, basing its contention on the earned freight provision in the bills of lading which accompanied both shipments, providing in part as follows:

"3. Full freight to destination on weight or measurement at Carrier's option at declared rates (unless otherwise agreed) and all advance charges against the goods are due and payable to the Carrier at its option upon the receipt of the goods by the

latter; and the same \* \* \* shall be deemed fully earned and due and payable to the Carrier at any stage, before or after loading of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid) Goods or Vessel lost or not lost, \* \* \*." (Emphasis supplied.)

1. The first issue, which relates only to plaintiff Guernsey-Westbrook Company, concerns the construction of the typewritten contracts of sale and purchase and the [32] earned freight clause in the printed bill of lading. The written orders sent by that plaintiff to defendant in each case provided for shipment of lumber CIF (cost, insurance and freight) to Brooklyn, New York, "Terms—After deducting ocean freight, sight draft for 98% attached invoice, original negotiable B/L & certificate of inspection and insurance. Draw draft through Marine Midland Trust Co., New York City." The acceptances executed by defendant read as follows: "Terms: Ocean freight net cash on arrival of steamer: Balance 98% sight draft with documents attached including negotiable bill of lading to order of Marine Midland Trust Co. of New York."

Plaintiff contends that because of the terms "ocean freight net cash on arrival of steamer," delivery of the lumber was a condition precedent to the right of defendant to freight, and that the typewritten contract controls despite the earned freight clause in the bill of lading.

In support of its contention, plaintiff cites *Toyo*

*Kisen Kaisha v. W. R. Grace Co.*, 48 F. (2d) 850, decided by this court, affirmed, 53 F. (2d) 740, Cert. Den. 273 U.S. 717. In that case plaintiff carrier sued for freight charges on a cargo intended for delivery to defendant at San Francisco, which was lost by fire at sea. The suit was based on a printed clause in the bill of lading: "said freight to be considered earned, lost or not lost." On the bill of lading was typed "freight as agreed." The letter of confirmation of verbal agreements with regard to freight terms addressed by defendant to plaintiff and accepted by plaintiff, and a letter to defendant's Valparaiso house written by defendant to notify the Valparaiso house of the shipment, contained the provision "Freight payable in San [33] Francisco on receipt of weights from Honolulu." This court held that the verbal agreement and letter of confirmation constituted the agreement of affreightment and that the bills of lading were merely receipts for the freight, given subsequently, and therefore no part of the contract of affreightment. The Circuit Court of Appeals affirmed the judgment on the ground that any conflict between the bill of lading and the earlier contract must be resolved in favor of the provisions of the earlier contract; that even though it be conceded that the bill of lading "supplemented" the earlier contract, it cannot contradict or nullify it. The court concluded that the oral agreement and confirmatory letter constituted the contract between the parties as to all matters relating to freight, and that the carrier was not entitled to earned freight.

Plaintiff contends that the contract provision in the *Toyo Kisen Kaisha* case for "Freight payable in San Francisco on receipt of weights from Honolulu" is no clearer or more explicit than the provision in the acceptances in the present case for "Ocean freight net cash on arrival of steamer;" that by the express terms of the contract, delivery at New York was a condition precedent to the payment of freight; and that the earned freight clause in the printed bill of lading is in conflict with this proviso of the typewritten contract and is therefore ineffective. Defendant claims that there is no conflict; that the term "Ocean freight net cash on arrival of steamer" determines how, and not when, payment of freight is to be made. It contends that the clause merely showed an election of one of the two [34] alternatives for payment of the purchase price provided by a CIF sales contract; that instead of the seller prepaying the freight and invoicing to the buyer the full purchase price, the seller was to send the freight collect and invoice the buyer for the total purchase price less the freight charges, which later the buyer agreed to pay the carrier; and that having obtained insurance on the goods and arranged for their carriage, the seller was absolved of further responsibility, and the risk of loss and liability for freight under the earned freight clause was on the buyer.

The question of risk of loss as between buyer and seller is not at issue here. The question involved is the liability of the buyer to the carrier under the contract of affreightment, which consists of the

orders and acceptances by plaintiff and defendant as buyer and seller, and the bills of lading issued by defendant as carrier. I think the contract of affreightment is ambiguous, in that it is not clear whether the provision in the acceptances "Ocean freight net cash on arrival of steamer" was intended as a condition or as a manner of payment of freight.

The general rule is that in the absence of a stipulation to the contrary, the carrier is entitled to freight only upon delivery to the consignee. *The Tornado*, 108 U.S. 342; *Burn Line v. U. S. & A. S. S. Co.*, 162 Fed. 298; *The Gracie D Chambers*, 253 Fed. 182; 58 C. J. §829. An agreement for earned freight must be so clear and unambiguous in its terms "as to leave no doubt that such was the intention in framing the contract of affreightment. Otherwise the general rule must prevail." *In re. Equitable Insurance Co.*, 88 Mass. 222, 224; *Norton* [35] *Crossing Co. v. Martin* (Ala.) 81 So. 71, 73; 58 C. J. 856. In the light of these rules and the fact that defendant prepared the acceptances and the bills of lading in question, I think that the ambiguity should be resolved in favor of plaintiff *Guernsey-Westbrook Company*. I therefore conclude that the typewritten contract provided that delivery should be a condition to the payment of freight, that this provision is in conflict with the earned freight clause in the bill of lading, and that the contract falls within the rule set forth in the *Toyo Kisen Kaisha* case.

With regard to plaintiff *Blanchard Lumber Com-*

pany, the contract which it made with defendant as shipper was FAS, that is, free aboard ship at St. Helens, Oregon, and the above discussion is not applicable to that plaintiff. The remaining issues, which concern the construction and legal effect of the earned freight clause, apply to both plaintiffs.

2. Plaintiffs claim that the earned freight clause was an optional one, and that since the first demand for freight was made by defendant after the abandonment of the voyage, it was too late for the exercise of the option. The defendant claims that the earned freight clause is not optional but is self-operating. The clause in question reads as follows:

“3. Full freight to destination on weight or measurement at Carrier’s option at declared rates (unless otherwise agreed) and all advance charges against the goods are due and payable to the Carrier at its option upon receipt of the goods by the latter; and the same and any further sums becoming payable to the Carrier hereunder and extra compensation, demurrage, forwarding charges, general average claims, and any payments made and liability incurred by the Carrier in respect of the Goods (not required hereunder to be borne by the Carrier) shall be deemed fully earned and due [36] and payable to the Carrier at any stage, before or after loading of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid) Goods or Vessel lost or not lost, \* \* \*.”  
(Emphasis supplied.)

The first option obviously refers to "weight or measurement"; the second refers to the right of the carrier to declare freight due and payable upon receipt of the goods. The latter option, as defendant states, was not exercised. The remainder of the clause, appearing after the semi-colon, necessarily relates to the carrier's right to freight "goods or vessel lost or not lost". The words "and the same" at the beginning of the second portion of the clause, can logically only relate to "full freight to destination" and not, as contended by plaintiffs, to "the freight which has become due and payable through the exercise of defendant's option." The latter portion of the clause can only be intended to provide for the contingency of defendant's inability to deliver the goods, whether advance freight and charges have or have not been paid. Otherwise the words "without deduction (if unpaid) or refund in whole or in part (if paid)" would be meaningless. It will also be noted that while the first section of the clause relates to freight and advance charges payable upon receipt of the goods by the carrier, at its option, the second portion relates to freight and to "further sums" which in their nature would become due after receipt of the goods, whether or not the option had been exercised, indicating that the exercise or non-exercise of the option would have no bearing on the effectiveness of the latter portion of the clause. In the lower right-hand corner on the face of the bill of lading is a "framed" space where freight may be designated either as "total collect" or "total prepaid". It

would be an unreasonable and forced [37] construction of the clause to find that defendant intended to secure its freight charges, in case of its inability to deliver the cargo, only if the same had been prepaid. I conclude that the earned freight clause is self-executing and that no option was required to be exercised to make it effective.

3. Plaintiffs contend that defendant was not justified in the abandonment of the voyage over their protest; that only if there was a commercial frustration of the voyage would defendant be entitled to freight under the earned freight clause. They cite *Mitsubishi Shoji Kaisha v. Societe Purfina Maritime (The Laurent Meeus)*, 133 F. (2d) 552 (C.C.A. 9, 1942), which defines the phrase "steamer or goods lost or not lost" as follows:

"It is established to mean any frustration of the voyage not caused by the act of the owner, including a frustration by government embargo within the restraints of princes, rulers and people clause, before the bill of lading containing the lost or not lost clause has been executed and when the vessel has not broken ground. *International Paper Co. v. The Gracie D. Chambers*, 248 U.S. 337, 391, 39 S. Ct. 149, 150, 63 L. Ed. 318."

The frustration of an adventure depends upon the facts of each case. *The Styria*, 186 U.S. 1.

Defendant contends that the facts connected with the abandonment bring it within the doctrine of commercial frustration. Mr. Joseph A. Lunny, vice-president and director of operations of defendant,

who determined upon the abandonment of the voyage, testified regarding his reasons for his decisions:

(a) That defendant could not determine how long it would take to repair the vessel, and thought in the interests of the cargo and all concerned, it was best to [38] abandon the voyage. Notice of abandonment was given on February 5, 1942.

(b) That because the lumber was damaged by water and oil, and because the Coast Guard would not allow it to be piled high enough in the yard and defendant did not have labor enough to pile it properly, it would have deteriorated over a period of months, due to "burning" or dry rot, and would have been likely to warp; that due to the fire hazard it was necessary to employ a watchman, which made the storage charges high.

The following reasons, as may be ascertained from his testimony, did not contribute materially to Mr. Lunny's decision, but are urged in defendant's brief:

(c) That a submarine menace existed upon the intercoastal route which would justify the termination of the voyage;

(d) That there was expectation in defendant's mind that the War Shipping Administration would requisition the vessel, and that it did in effect requisition her as of the time she should be repaired, by wire dated April 14, 1942.

A. Plaintiffs urged that delay is not sufficient reason for the abandonment. The bill of lading

provides that "Carrier is not and shall not be required to deliver said packages at the port of discharge or port of destination at any particular time, or to meet any particular market, or in time for any particular use." Section VI(a) of "Official West Coast Standard Sales and Shipping Practices" etc., published and distributed by West Coast Lumbermen's Association, of which defendant was a member, contains [39] a similar provision, as between seller and buyer, with respect to delay. Plaintiffs reasonably contend that the right to complete the voyage despite delay carried with it a correlative duty to carry out the contract despite delay, in the absence of extraordinary circumstances. Plaintiffs indicated by their objection to the abandonment a willingness to accept delayed shipments. There is no showing that the purposes of the contract would be frustrated by a indefinite delay. Also, Bethlehem Steel Company tendered defendant its offer for repairs on January 22, 1942, and the repair contract was negotiated. The repairs were actually completed on May 9, 1942. There are not sufficient facts to justify defendant's determination, of which notice was given on February 5, or two weeks after the offer for repairs, that there would be such an inordinate delay in repairing the vessel as to justify an abandonment.

B. Plaintiffs claim that there was no substantial danger of deterioration of the lumber, as indicated by the fact that some of it stood on the docks for more than five months before being sold and that there is nothing in the record to show

that it was injured thereby. They further argue that since it was their lumber, and not defendant's, and since they were willing to assume the risk of delay and any resultant damage to the lumber, it was no concern of defendant's and did not justify an abandonment. In *The Bohemia*, 38 F. 756, 758, an action involving damage to a cargo of potatoes during quarantine, the court said, "It is the general rule of the maritime law that in extraordinary circumstances, the master shall consult the shipper or consignee, where practicable, as respects his interests." I [40] think that since plaintiffs were willing to risk deterioration of the lumber, defendant may not rely on the possibility of such deterioration as a ground of abandonment.

C. While Mr. Lunny testified that there existed a submarine menace on the inter-coastal route, he based his decision to abandon the voyage primarily upon delay. The voyage was commenced after the attack on Pearl Harbor, and he testified that he was aware of the danger of torpedoes from that time; that the day after the Pearl Harbor attack he had placed war risk insurance on all defendant's vessels and the cargoes which they carried. I think for purposes of the earned freight clause defendant assumed the risk of the continuance of a condition that existed at the time it undertook the voyage. *Rotterdamische Lloyd v. Cosho Co.* (C.C.A. 9) 298 Feb. 443. Furthermore, since defendant expected the voyage to be delayed for an indefinite period, it was highly speculative what, if any, men-

ace would exist at the time the voyage could be resumed.

D. Mr. Lunny apparently did not base his decision to abandon the voyage upon the possibility that the vessel would be requisitioned. He testified that "No one could say what the condition would be at the time she was repaired. She may well have continued on her voyage." "Q. It was not a troopship or a ship that was vitally needed at that time? A. No, she was not vitally needed at that time, to the best of my knowledge; at least, we had no advice they wanted the vessel \* \* \*." Thus it appears that the abandonment was not based upon even an apprehension of requisition by the Government. The fact that there was in effect a subsequent requisition does not relate back to and [41] validate the prior abandonment. It may have been that if defendant had not abandoned the voyage the Government would have permitted it to fulfil its existing contracts before taking possession.

Counsel for defendant states that it might have been hazardous to carry oil-soaked lumber in the hold of the ship. There is no testimony which indicates that the fear of such danger contributed in any way to the decision to abandon.

Defendant quotes paragraph 7 of the bill of lading, which gives the carrier broad rights, under certain existing or anticipated conditions such as war, blockade, government regulations etc., which may cause the Master to decide that it is unsafe or impracticable to continue the voyage, to aban-

don the voyage and store the goods at the owner's expense, retaining a lien "for all proper charges \* \* \* ." While this provision might be a defense in case of an action against defendant for failure to deliver the lumber, it does not determine what shall as a matter of law constitute commercial frustration, entitling the owner to earned freight. Also, a clause permitting the carrier to terminate the voyage "must be given a reasonable interpretation, and the discretion conferred may not be exercised in an arbitrary or unreasonable manner, nor without substantial grounds, nor will good faith alone suffice." *The Wildwood* (C.C.A. 9) 133 F. (2d) 765, 767.

4. The fourth issue presented for decision is whether defendant is entitled to earned freight in view of all the circumstances in this case. I conclude that there was not a commercial frustration such as to entitle defendant to earned freight on the lumber which remained on the vessel [42] when the *Absaroka* was towed into San Pedro. Defendant is entitled to earned freight on the lumber lost overboard which is allocable to plaintiff Blanchard Lumber Company, such freight being in the amount of \$26.59. As heretofore stated, the earned freight clause is not applicable to plaintiff Guernsey-Westbrook Company.

At the time of the trial the Court reserved its rulings upon the admissibility of defendant's Exhibits Nos. 2 and 3.

It is Ordered:

1. Plaintiff Guernsey-Westbrook Company may have judgment as prayed for, with interest from .....

2. Libellant Blanchard Lumber Company may have judgment as prayed for, less the sum of \$26.59, with interest from.....

(Unless stipulated to by parties, dates from which interest shall run to be fixed upon taking further evidence.)

3. Plaintiffs' objections to the admission in evidence of defendant's Exhibits Nos. 2 and 3 are overruled.

Plaintiff and libellant may submit findings of fact and conclusions of law in their respective actions in accordance herewith.

Dated: October 2, 1945.

A. F. ST. SURE,

United States District Judge.

[Endorsed]: Filed Oct. 5, 1945. [43]

---

[Title of District Court and Cause—No. 23058-S.]

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

The above entitled cause came regularly on for hearing on the 27th day of April, 1945, the plaintiff Guernsey-Westbrook Company appearing by Farn-

ham P. Griffiths, Charles E. Finney and McCutchen, Thomas, Matthew, Griffiths & Greene, and the defendant appearing by Allan E. Charles, Herbert Bartholomew and Lillick, Geary, Olson & Charles, and evidence both oral and documentary having been received and the cause having been argued and submitted and the Court having considered the evidence of the arguments of counsel, the Court now makes the following: [44]

## FINDINGS OF FACT

### I.

At all times herein mentioned plaintiff, Guernsey-Westbrook Company, was and now is a corporation duly incorporated under the laws of the State of Connecticut.

### II.

At all times herein mentioned defendant, Pope & Talbot, Inc., was and now is a corporation duly incorporated under the laws of the State of California, and was the owner and operator of the steamship Absaroka.

### III.

Prior to December 13, 1941 plaintiff agreed to buy from defendant and defendant agreed to sell to the plaintiff a quantity of Douglas fir lumber to be shipped by steamer by defendant from St. Helens, Oregon, to Brooklyn, New York.

That the copy of the order for a portion of said lumber attached to the stipulation of the parties filed herein on October 30, 1944, and designated

Exhibit 4 therein, is a true copy of one of the orders placed by plaintiff with defendant covering the purchase of a part of the above mentioned lumber, and like orders were placed by plaintiff with defendant covering all of the purchases of said above mentioned lumber.

That the acceptance of order attached to said stipulation filed herein on October 30, 1944, and designated therein Exhibit 5, is one of the original acceptances by defendant of the orders of plaintiff for the purchase of a portion of the lumber above mentioned, and like acceptances of orders were made and executed by defendant covering all of the purchases of the above mentioned lumber.

The copy of the invoice attached to said stipulation and [45] designated therein Exhibit 2 is a true copy of one of the original invoices issued by defendant to plaintiff covering the purchase of a portion of the above mentioned lumber, and like invoices were issued by defendant to plaintiff covering all of the purchases of said lumber.

The bill of lading attached to said stipulation filed herein on October 30, 1944, and designated therein Exhibit 1, is one of the bills of lading which were issued for the above mentioned shipments of lumber and like bills of lading were issued covering all of the shipments of all of said lumber.

#### IV.

On or about December 13, 1941 defendant caused said lumber to be loaded on board its steamship

Absaroka at the port of St. Helens, Oregon, and on said date defendant issued bills of lading as above mentioned covering said shipments. It was provided in said bills of lading that the said lumber was to be transported by defendant on said steamship Absaroka from St. Helens, Oregon, to the Port of Brooklyn, New York, and the freight on said lumber was to be collected at destination. The steamship Absaroka sailed from St. Helens, Oregon, on December 18, 1941, in a seaworthy condition, carrying the above mentioned shipments of lumber. She was torpedoed off the California coast near Los Angeles on December 24, 1941 and was so badly damaged that she would have sunk except for the buoyancy of her lumber cargo. A small portion of the cargo was lost overboard and a portion stained by oil.

#### V.

After the above mentioned torpedoing the steamship Absaroka was towed into San Pedro where she was repaired at a cost of approximately \$327,000 after the cargo of lumber had been removed. [46] Due to priorities, the repairs were not completed until May 9, 1942. Meanwhile, on February 5, 1942, after repairs had been commenced defendant, over plaintiff's protest, notified plaintiff that it abandoned the voyage at Los Angeles, California, and refused to carry the lumber to destination. Defendant stated in the written notice of abandonment: "We reserve our lien and right against the freight and other expenses in accordance with the terms of the bill of lading." It

would have been difficult, if not impossible, for plaintiff to obtain space for shipment of the lumber on other intercoastal vessels. After notice of abandonment and considerable negotiation it was agreed that the lumber should be sold at Los Angeles without prejudice to any of the rights of plaintiff. The lumber was thereafter sold for plaintiff's account and the freight moneys, which are the subject of the present suit, were deducted from the purchase price by defendant. The amount of the freight moneys withheld by defendant is \$10,543.85 and no part of that sum has since been paid by defendant to plaintiff.

## VI.

On April 14, 1942 the War Shipping Administration telegraphed defendant that it required the use of the vessel *Absaroka* and requested her delivery to the War Shipping Administration after completion of the repairs. The vessel was chartered to War Shipping Administration by a time charter dated May 9, 1942.

## VII.

Prior to the commencement of the voyage above mentioned defendant secured sufficient marine and war risk insurance to cover all freight on all cargo on board the *Absaroka* in the approximate sum of \$80,000. The Insurance Company is contesting its obligations under the war risk insurance on all cargo on the [47] vessel on grounds not pertinent to the present case.

## VIII.

The offer or bid of Bethlehem Steel Company for the repair of the steamship Absaroka was tendered to the defendant on January 22, 1942, and the repair contract was negotiated on that day. Plaintiff, by its objection to the abandonment of the voyage, expressed its willingness to accept delayed shipments. On February 5, 1942, defendant did not have sufficient facts upon which to base a determination that there would be such unreasonable delay in repairing the vessel as to justify an abandonment. The bills of lading under which the shipments of lumber were being carried provided that the carrier should not be required to deliver the shipments at the port of discharge or port of destination at any particular time or to meet any particular market or in time for any particular use, and Section VI(a) of the Official West Coast Standard Sales and Shipping Practices contains a similar provision. The lumber which remained on the docks for more than 5 months after it was unloaded from the Absaroka did not sustain any damage or deterioration.

## IX.

The danger from submarine attacks to a vessel bound on an intercoastal voyage existed at the time the steamship Absaroka sailed from St. Helens, Oregon, on this voyage. Defendant was aware of that danger at the time that the vessel sailed. Defendant did not know on February 5, 1942, what situation would exist with respect to danger from submarine attack at the time when the repairs to

the vessel would be completed. Since defendant expected the voyage to be delayed for an indefinite period, it was highly speculative what, if any, menace would exist at the time the voyage could be resumed. Defendant based its decision to abandon the voyage primarily on delay. [48]

### X.

The defendant did not base its decision to abandon the voyage upon the possibility that the vessel would be requisitioned by the War Shipping Administration. The *Absaroka* was not suitable for a troopship and in the opinion of defendant was not vitally needed by the War Shipping Administration at the time when the voyage was abandoned. The defendant had not been advised that the Government required the *Absaroka* when it abandoned the voyage on February 5, 1942.

### XI.

The abandonment of the voyage on February 5, 1942, was based primarily upon the ground that it could not be determined how long it would take to repair the steamship *Absaroka*, and that because the lumber was damaged by water and oil, and because the Coast Guard and the Navy would not allow it to remain piled high and defendant did not have labor enough to pile it properly, it would have deteriorated over a period of months due to "burning" or dry rot and would have been likely to warp; that due to the fire hazard it was necessary to employ a watchman, which made the storage charges high.

## XII.

The contract of affreightment is contained in the above mentioned orders and acceptances and the bills of lading issued by the defendant as carrier. The typewritten provisions in the orders and acceptances made the delivery of the lumber at its destination in Brooklyn, New York, a necessary condition to be fulfilled before plaintiff was required to pay freight for the transportation of the lumber from St. Helens, Oregon, to Brooklyn, New York. The bills of lading contained a printed earned freight clause. There is a conflict between the above [49] mentioned typewritten provisions of the orders and acceptances and the printed earned freight clause of the bills of lading, and in this situation the typewritten provisions prevail.

From the foregoing facts the Court renders the following

## CONCLUSIONS OF LAW

## I.

There was no commercial frustration of the voyage of the steamship Absaroka from St. Helens, Oregon, to Brooklyn, New York, which justified the abandonment of the voyage at Los Angeles.

## II.

The contract between the parties with respect to the freight for transportation of the lumber from St. Helens, Oregon, to Brooklyn, New York, is contained in the orders and acceptances executed by the parties to this action and the bills of lading

issued by the defendant as carrier. The printed provisions of the bills of lading with respect to freight being earned and due and payable, goods or vessel lost or not lost, is in conflict with type-written provisions in the orders and acceptances which made delivery of the lumber at its destination a condition to be fulfilled before plaintiff was required to pay freight. In this situation the type-written provisions of the orders and acceptances prevail.

### III.

Defendant is not entitled to retain the freight on any of the shipments of lumber.

### IV.

Plaintiff is entitled to a judgment herein in the amount of \$10,543.85. [50]

### V.

The earned freight clause contained in defendant's bill of lading is self-executing and no option was required to be exercised to make it effective.

Let final judgment be entered for the plaintiff in the sum of \$10,543.85, together with interest thereon at the rate of 7 per cent per annum, from the 11th day of January, 1943, until paid.

Dated: December 3, 1945.

A. F. ST. SURE

United States District Judge

[Endorsed]: Filed Dec. 3, 1945. [51]

In the Southern Division of the United States  
District Court for the Northern District  
of California

No. 23058-S

GUERNSEY-WESTBROOK COMPANY, a Cor-  
poration,

Plaintiff,

vs.

POPE & TALBOT, INC., a Corporation,  
Defendant.

### JUDGMENT

The above-entitled cause having been fully tried and submitted to the court for decision and the court having heretofore rendered its findings of fact and conclusions of law ordering judgment in favor of the plaintiff and against the defendant:

Now, Therefore, it is hereby Ordered, Adjudged and Decreed that the plaintiff, Guernsey-Westbrook Company, a corporation, have and recover from the defendant Pope & Taybot, Inc., a corporation, the sum of \$10,543.85, together with costs of suit to be taxed at \$48.57, and interest on said total sum at the rate of 7 per cent per annum until said judgment shall have been fully paid and satisfied.

Dated: San Francisco, California, January 2,  
1946.

A. F. ST. SURE

United States District Judge

Approved as to form:

/s/ LILLYCK, GEARY, OLSEN &  
CHARLES

Attorneys for Defendant

[Endorsed]: Filed Jan. 2, 1946. [52]

---

[Title of District Court and Cause.]

### AMENDED JUDGMENT

Good cause appearing therefor, it is hereby Ordered, Adjudged and Decreed that the judgment heretofore signed and filed herein on January 2, 1946, be amended and corrected and same is amended and corrected to read as follows:

The above-entitled cause having been fully tried and submitted to the court for decision and the court having heretofore rendered its findings of fact and conclusions of law ordering judgment in favor of the plaintiff and against the defendant: [53]

Now, Therefore, it is hereby Ordered, Adjudged and Decreed that the plaintiff, Guernsey-Westbrook Company, a corporation have and recover from the defendant Pope & Talbot, Inc., a corporation, the sum of \$10,543.85 and interest on said sum at the rate of 7 per cent per annum from the 11th day of January, 1943, until said judgment shall have been fully paid and satisfied, together with costs of suit to be taxed at \$48.57.

Dated: San Francisco, California, March 26, 1946.

A. F. ST. SURE

United States District Judge

Approved as to form:

LILLICK, GEARY, OLSON &  
CHARLES

Attorneys for Defendant

[Endorsed]: Filed March 26, 1946. [54]

---

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT  
COURT OF APPEALS

Notice Is Hereby Given that Pope & Talbot, Inc., a corporation, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the judgment entered in this action on January 2, 1946, and from the amended judgment entered in this action on March 26, 1946.

Dated April 1, 1946.

/s/ LILLICK, GEARY, OLSON &  
CHARLES

Attorneys for Appellants

(Acknowledgment of Service.)

[Endorsed]: Filed April 1, 1946. [55]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH  
APPELLANT INTENDS TO RELY ON  
APPEAL

Now Comes Pope & Talbot, Inc., appellant herein, and pursuant to Rule 75-d of the Federal Rules of Civil Procedure makes the following statement of the points upon which appellant intends to rely on this appeal:

I.

The District Court erred in finding that the orders and acceptances for the sale of the lumber were part of the contract of affreightment for the transportation of the lumber.

II.

The District Court erred in failing to find that the orders of Guernsey-Westbrook Company, plaintiff, and the acceptances of Pope & Talbot, Inc., defendant, constitute the contract of sale [56] between the said Guernsey-Westbrook Company, as buyer, and Pope & Talbot, Inc., Lumber Division, as seller.

III.

The District Court erred in failing to find that the bill of lading issued by Pope & Talbot, Inc., Steamship Division, as carrier, constituted the contract of affreightment for the transportation of the lumber involved in this action.

IV.

The District Court erred in finding that the pro-

visions of the orders and acceptances made the delivery of the lumber at its destination in Brooklyn, N. Y., a necessary condition to be fulfilled before plaintiff, Guernsey-Westbrook Company, was required to pay the freight for the transportation of the lumber.

#### V.

The District Court erred in failing to find that the orders and acceptance constituted a C.I.F. contract of sale for the lumber under which the Guernsey-Westbrook Company, as buyer, became unconditionally obligated to pay the freight regardless of delivery of the lumber at Brooklyn, N. Y.

#### VI.

The District Court erred in finding that the earned freight clause of the bill of lading was in conflict with the provisions of the orders and acceptances.

#### VII.

The District Court erred in failing to find that Pope & Talbot, Inc., was entitled to retain the freight and thus give effect to the earned freight clause of the bill of lading.

#### VIII.

The District Court erred in finding that on February 5, 1942, respondent did not have sufficient facts upon which to base a [57] determination that there would be such unreasonable delay in repairing the vessel as to justify an abandonment.

## IX.

The District Court erred in finding that the lumber which remained on the docks for more than five (5) months after it was unloaded from the S. S. Absaroka did not sustain any damage or deterioration and further erred in failing to find that a large portion of said lumber cargo was oil soaked as a result of the torpedoing.

## X.

The District Court erred in failing to find and conclude that the charter of the vessel Absaroka to the War Shipping Administration entered into May 9, 1942, had the legal effect of a requisition since the charter was offered by the Government as an alternative to the requisitioning of the vessel and the District Court further erred in failing to find that respondent based its decision in part upon the possibility that the vessel would be requisitioned by the War Shipping Administration.

## XI.

The District Court erred in failing to find and conclude that the following grounds or any of them constituted commercial frustration justifying respondent's determination to abandon the voyage of the steamship Absaroka on February 5, 1942, and to find that all of such grounds existed:

(1) That at the time of respondent's determination to abandon the voyage there was a great peril from Japanese submarine activity and many vessels were being torpedoed on the West Coast;

(2) That at the time of respondent's determination to abandon the voyage it was reasonably anticipated [58] that at the time repairs to the steamship Absaroka would be completed, such time being uncertain, that there would be great peril from Japanese submarine activities on the West Coast of the United States;

(3) That at the time of respondent's determination to abandon the voyage there was an increase in the torpedoing of vessels on the East Coast of the United States and in the Caribbean Sea by reason of German submarine activity;

(4) That at the time of respondent's determination to abandon the voyage it was reasonably anticipated that at the time repairs to the steamship Absaroka would be completed, such time being uncertain, the torpedoing of vessels on the East Coast and in the Caribbean Sea by German submarine activity would not be diminished;

(5) That at the time of Respondent's determination to abandon the voyage no intercoastal voyages were being undertaken and that it could be reasonably anticipated that at the time the repairs to the steamship Absaroka would be completed, such time being uncertain, no intercoastal voyages would be undertaken;

(6) That at the time of respondent's determination to abandon the voyage it was impossible to predict the length of time required to complete repairs on the steamship Absaroka because of priority of Army, Navy, and War Shipping Administration

vessels in obtaining repairs ahead of commercial vessels such as the *Absaroka*; [59]

(7) That at the time of respondent's determination to abandon the voyage there was a strong probability that on the completion of the repairs to the steamship *Absaroka* the vessel might be requisitioned by the government for the uncertain duration of the war;

(8) That at the time of respondent's determination to abandon the voyage there was a strong probability that at the time of completion of repairs to the steamship *Absaroka* the vessel might be required by the government to proceed in some direction other than intercoastal;

(9) That at the time of respondent's determination to abandon the voyage there was a strong probability that at the time of completion of repairs to the steamship *Absaroka* there would be no convoy available;

(10) That at the time of respondent's determination to abandon the voyage there was a strong probability that at the time the repairs to the steamship *Absaroka* would be completed the damage to the cargo by oil and salt water would be such as to make it a worthless cargo;

(11) That at the time of respondent's determination to abandon the voyage there was insufficient labor available to properly pile the lumber to protect it from fire and deterioration and it could be reasonably anticipated that such condition would continue;

(12) That at the time of respondent's determination to abandon the voyage the respondent knew before the voyage could be resumed there would be a long period of storage and that the costs of storage would be excessive. [60]

(13) That at the time of the respondent's determination to abandon the voyage the United States Coast Guard required respondent to employ watchmen to guard and protect the lumber from fire resulting from the soaking of the lumber by oil, which costs would be excessive.

## XII.

The District Court erred in failing to find that the factors enumerated in paragraph XI above did not exist at the time the contract to transport libellant's lumber was made.

## XIII.

The District Court erred in finding and concluding that there was no commercial frustration of the voyage of the steamship Absaroka from St. Helens, Oregon, to Brooklyn, New York, which justified the abandonment of the voyage at Los Angeles.

## XIV.

The District Court erred in failing to find and conclude that there was a commercial frustration of the voyage of the steamship Absaroka from St. Helens, Oregon, to Brooklyn, New York, which justified the abandonment of the voyage at Los Angeles.

## XV.

The District Court erred in failing to find that

defendant is entitled to retain the freight on all of the shipments of lumber involved in the action.

EDWARD D. RANSOM  
LILLICK, GEARY, OLSON &  
CHARLES

Attorneys for Defendant,  
Pope & Talbot, Inc.

(Acknowledgment of Service attached.)

[Endorsed]: Filed April 30, 1946. [61]

---

[Title of District Court and Cause.]

**BOND FOR COSTS ON APPEAL**

Know All Men By These Presents:

That we, Pope & Talbot, Inc., a corporation, as principal, and Firemen's Fund Indemnity Company, a corporation organized and existing under and by virtue of the laws of the State of California and authorized to do a surety business in the state and northern district of California, as surety, are held and firmly bound unto Guernsey-Westbrook Company in the full and just sum of Two Hundred Fifty Dollars (\$250.00) to be paid to the said Guernsey-Westbrook Company, its successors and assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

.....  
.....

Sealed with our Seals and dated this 1st day of April, 1946. [62]

Whereas, on January 2, 1946, in an action pending in the Southern Division of the United States District Court for the Northern District of California between Guernsey-Westbrook Company, a corporation, as plaintiff, and Pope & Talbot, Inc., a corporation, defendant, a judgment and an amended judgment were rendered against said defendant, Pope & Talbot, Inc., a corporation, and the said defendant, Pope & Talbot, Inc., a corporation, having filed a notice of appeal from such judgment and such amended judgment to the United States Circuit Court of Appeals of the Ninth Circuit;

Now, the condition of this obligation is such that if the said Pope & Talbot, Inc., a corporation, defendant, shall prosecute its appeal to effect and shall pay costs if the appeal is dismissed or the judgment affirmed, or such costs as the said Circuit Court of Appeals may award against the said Pope & Talbot, Inc., a corporation, defendant, if the judgment is modified, or in any other event, then this obligation to be void; otherwise to remain in force and effect.

This bond shall be deemed and construed to contain the provisions mentioned in Rule 10 of the above entitled court.

FIREMAN'S FUND INDEMNITY COMPANY

By .....

Its Attorneys in Fact (F. J. Crips)

The foregoing bond is hereby approved this 1st day of April, 1946.

A. F. ST. SURE

United States District Judge

State of California,

City and County of San Francisco—ss.

On this 1st day of April, 1946, before me, Marie H. Stanley, a Notary Public in and for said City and County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared F. J. Crisp, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Fireman's Fund Indemnity Company, and acknowledged to me that he subscribed the name of Fireman's Fund Indemnity Company thereto as principal, and his own as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the said City and County of San Francisco the day and year in this certificate first above written.

/s/ MARIE H. STANLEY

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires November 20, 1947.

[Endorsed]: Filed April 1, 1946. [63]

[Title of District Court and Cause.]

STIPULATION AND ORDER FOR TRANSMISSION OF ORIGINAL TRANSCRIPT OF TESTIMONY AND ORIGINAL EXHIBITS

It is hereby stipulated by and between the parties hereto as follows:

1. The original transcript of testimony and proceedings at the trial April 27, 1945, shall be transmitted in its original form by the Clerk of the above entitled Court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit in the preparation of the Record on Appeal on the appeal of Pope & Talbot, Inc., a corporation, appellant from the original judgment made and entered in the above entitled matter on the 2nd day of January, 1946, and the amended final judgment made and entered on March 26, 1946, and said original transcript of testimony and proceedings shall be returned to the Clerk of the above entitled Court after the final [64] determination of said appeal.

2. In lieu of copies, Exhibits 1 to 3, inclusive, offered upon the trial of said matter on April 27, 1945, and Exhibits I, II, III, IV and V attached to Stipulation for Pre-Trial Order filed October 30, 1944, and deemed to be admitted in evidence by said Stipulation for Pre-Trial Order, shall be transmitted to the Circuit Court of Appeals for the Ninth Circuit in their original form as original exhibits, and said exhibits shall be returned to the Clerk of

the above entitled Court after the final determination of said appeal.

3. In lieu of copies, Exhibit A attached to and made a part of the Answer of Pope & Talbot, Inc., a corporation, filed April 27, 1944, shall be transmitted to the Circuit Court of Appeals for the Ninth Circuit in its original form as an original exhibit to the said Answer, and said exhibit shall be returned to the Clerk of the above entitled Court after final determination of said appeal.

Dated: San Francisco, California, April 22nd, 1946.

EDWARD D. RANSOM,  
LILLICK, GEARY, OLSON &  
CHARLES

Attorneys for Pope & Talbot,  
Inc., Appellant

FARNHAM P. GRIFFITHS  
McCUTCHEN, THOMAS, MAT-  
THEW, GRIFFITHS &  
GREENE

Attorneys for Guernsey-West-  
brook Company, Appellee

It is so ordered this 30th day of April, 1946.

CHARLES N. PRAY

United States District Judge

[Endorsed]: Filed April 30, 1946. [65]

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD  
ON APPEAL

To the Clerk of the Above Entitled Court:

In compliance with Rule 75-A of the Rules of Civil Procedure, please include the following in the Record of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit:

1. The complaint of Guernsey-Westbrook Company, filed December 23, 1943.
2. Answer of Pope & Talbot, Inc., a corporation, filed April 27, 1944.
3. Stipulation for Pre-Trial Order filed October 30, 1944, including Exhibits I, II, III, IV and V attached thereto.
4. Pre-Trial Order made and filed November 27, 1944. [66]
5. All testimony and proceedings at the trial April 27, 1945.
6. All exhibits introduced at the trial April 27, 1945.
7. Memorandum Opinion and Order for Judgment filed October 5, 1945.
8. Findings of Facts and Conclusions of Law filed December 3, 1945.
9. Judgment filed and entered January 2, 1946.
10. Amended Judgment filed and entered March 26, 1946.

11. Notice of Appeal filed April 1, 1946.
12. Bond for Costs on Appeal filed April 1, 1946.
13. Stipulation and Order of Transmission of original transcript of testimony and original exhibits.
14. Statement of Points Upon Which Appellant Intends to Rely on Appeal.
15. This Designation of Portions of Record on Appeal.

EDWARD D. RANSOM,  
LILLICK, GEARY, OLSON &  
CHARLES,

Attorneys for Pope & Talbot,  
Inc., Appellant.

(Acknowledgment of Service attached.)

[Endorsed]: Filed April 30, 1946. [67]

---

District Court of the United States,  
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 67 pages, numbered from 1 to 67, inclusive, contain a full, true, and correct transcript of the records and

proceedings in the case of Guernsey-Westbrook Co., Plaintiff, vs. Pope & Talbot, Defendant, No. 23058 S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$11.35, and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 10th day of May, A. D. 1946.

[Seal]

C. W. CALBREATH

Clerk.

/s/ E. H. NORMAN,

Deputy Clerk. [68]

In the Southern Division of the United States  
District Court, In and For the Northern Dis-  
trict of California

Before: Hon. A. F. St. Sure, Judge.

No. 23058-S

GUERNSEY-WESTBROOK COMPANY,  
a corporation,

Plaintiff,

vs.

POPE & TALBOT, INC., a corporation,  
Defendant.

In Admiralty—No. 23992-R

BLANCHARD LUMBER COMPANY OF SE-  
ATTLE, a corporation, and HATHEWAY-  
PATTERSON CORP., a corporation,  
Libelants,

vs.

POPE & TALBOT, INC., a corporation,  
Respondent.

## REPORTER'S TRANSCRIPT

Friday, April 27, 1945

Counsel Appearing: For Plaintiff and Libelants:  
Allan E. Charles, Esq. For Defendant and Re-  
spondent: Charles E. Finney, Esq.

The Court: Are these two cases consolidated for  
trial, Guernsey-Westbrook Company against Pope

& Talbot, and Blanchard [1\*] Lumber Company against Pope & Talbot? They are consolidated for trial?

Mr. Finney: One is at law and one at admiralty. They are not technically consolidated, but they arise out of the same circumstances and we have agreed to proceed together with the cases.

The Court: Very well. What are the issues?

Mr. Finney: If your Honor please, the cases are suits for the return of freight money for cargo that was to be carried upon the steamship "Absaroka." The "Absaroka" was torpedoed on December 24, 1941, off Point Fermin, just outside the Los Angeles Harbor, and thereafter went into Los Angeles Harbor. The vessel was badly injured in the torpedoing and the voyage was later abandoned by the carrier at Los Angeles. The lumber was later sold and the sale was handled through Pope & Talbot, the Defendant, and the Respondent, in these cases, at Los Angeles, with a reservation of the rights of the parties in all respects. The money for the sale of the lumber came into the hands of Pope & Talbot. They handled the sale, and they, Pope & Talbot have kept the money that would be the freight for carrying the goods, or lumber, to Brooklyn, New York, and one cargo to Philadelphia. So in that one the suit has been brought by us to recover that sum of freight money which we claim we were entitled to, that which we were not obliged to pay under the contract of this case. [2]

The Guernsey-Westbrook case involves a shipment

---

\* Page numbering appearing at top of page of original Reporter's Transcript.

of lumber. The lumber came from St. Helens, Oregon. It was loaded there. The sale of the lumber was by Pope & Talbot. It is all one company, but they operate a lumber division and a steamship division. The lumber was sold by Pope & Talbot to Guernsey-Westbrook Company under a set of documents which are covered by stipulation in connection with the pre-trial order. A stipulation has already been made that covers a great deal of the case, and all of our case is covered by pre-trial order. The first document was a document of Guernsey-Westbrook Company which is called an order for the lumber, addressed to Pope & Talbot, on which there appears quantities of lumber. There are a number of these documents, but we have stipulated that these in evidence are the typical ones, and that there were conditions issued for all the cargoes of like tender.

This order designates certain types and quantities of lumber to be purchased, that it was to be shipped by steamer. According to the order, the destination was CIF, Green Street, Brooklyn, New York. It reads:

“After deducting ocean freight, sight draft for 98 per cent attached invoice, original negotiable B/L & Certificate of Inspection & Insurance.”

It then specifies how the draft will be drawn. In other words, the order says that Pope & Talbot may draw a draft for the payment of the price of the lumber, and the price of the [3] lumber on which the ocean freight is based is specified in the order. It says, “Prices based on existing ocean freight rate

of \$16.00 per M' net." In other words, they pay so much for the lumber on this coast, add to the price so much for ocean freight to get it to Brooklyn.

Then on receipt of that Pope & Talbot addressed an "Acceptance of Order," which is a printed document entitled "Acceptance of Order," and it is addressed to Guernsey-Westbrook Company, in which they say, "To be delivered at ex vessel Green Street, Brooklyn, N. Y." This one specifies Green Street also. They all don't do that, but they are all at some dock in Brooklyn. It again specifies the quantities, the types of lumber. Then it says—this is the acceptance of the order; this is the document executed by Pope & Talbot—"Terms: Ocean Freight net cash on arrival of steamer; balance 98% Sight draft with documents attached, including negotiable bill of lading to order of Marine Midland Trust Company." Then also, "Any change in ocean freight rate prior to shipment will be for buyer's account." In other words, the price will go up if the ocean freight rate goes up before actual shipment. At the bottom it says, "Unless notified to the contrary at once and excepting clerical and stenographic errors order will be executed as written above and is final and binding on both of us."

Following that, Pope & Talbot issued an invoice for the lumber and which again refers to CIF, Brooklyn, New York, Sold [4] to Guernsey-Westbrook Company. The order specifies the types and quantities of lumber. Again it says, "Ocean freight net cash on arrival of steamer, balance 98% sight draft with documents attached," and so forth.

Now, our position in the case is that those are the documents under which this lumber was sold by Pope & Talbot, the defendant, to Guernsey-Westbrook, the plaintiff; that the terms of that affreightment were fixed in those documents, the freight to be payable when and if the lumber arrived in Brooklyn, New York, \$16 per thousand; that the bill of lading that was issued—there were bills of lading issued in all these cases—showed Pope & Talbot appearing as the shipper, and the lumber “Consigned to the order of Marine Midland Trust Company of New York, notify the Guernsey-Westbrook Company, Hartford, Connecticut.”

It is our position the bill of lading is a mere receipt for the goods under the theory or the principle involved in a decision by your Honor in the *Toyo Kisen Kaisha* case, which was affirmed in the Circuit Court of Appeals, where the terms of the contract of affreightment are fixed on prior agreement and the bill of lading becomes a mere receipt for the goods, and that under these documents the freight is collect when the goods are delivered from the ship's slings in Brooklyn, New York.

The respondent or defendant contends, as I understand the theory, that the bill of lading is controlling, and that there is a clause in the bill of lading that entitles it to freight [5] even though the voyage is not completed, that is, if there is a justifiable abandonment of the voyage. As to that, we say it is not a good earned freight agreement. To cover this situation it has an optional clause that was never exercised. We say in this case the bill of lading is a mere receipt.

The only other interpretation of this is what the terms of the contract say, a sale of a quantity of lumber at a certain price, in which the parties have agreed in the documents that \$16 of that price is for the transportation from the west coast to the east coast, and if the transportation from the west coast to the east coast was not made by the seller we are entitled to the return of the \$16 for freight, which they have agreed is the portion of the price attributable to transportation. The freight rate is specified in the bill of lading at \$16 a thousand, and it specifies the freight is collect.

The contract, as I have stated, is CIF, and under those CIF contracts the shipper undertakes to deliver the goods, that is, the seller either pays the freight or deducts the amount of the freight from the purchase price and sends it freight collect, pays the insurance and other costs, and sends the documents on to the consignee. In this case, the shipper is Pope & Talbot, so Pope & Talbot were responsible for the payment of the freight. It is true that Pope & Talbot were also the carrier, so they were responsible to themselves; but under CIF contracts the consignee is not responsible for the freight, [6] unless and until he receives the goods. The consignee, of course, never received the goods, because they never went forward beyond Los Angeles. That all relates to the Guernsey-Westbrook case.

As to the Blanchard case, there are not the same delivery documents, that is, the contract of sale and contract of freight were not made under these purchases and acceptances, but there was merely an

invoice issued, so as to that that suit is in admiralty rather than at law; as to that, it just turns right on the interpretation of the earned freight clause in the bill of lading. The earned freight clause, we say, is the usual clause, which provides it is fully earned at the time the delivery of goods to the carrier starts.

“Full freight to destination on weight or measurement at Carrier’s option at declared rates (unless otherwise agreed) and all advance charges against the goods are due and payable to the carrier at its option upon receipt of the goods by the latter; and the same and any further sums becoming payable to the carrier hereunder and extra compensation, demurrage, forwarding charges, general average claims and any payments made and liability incurred by the carrier in respect of the goods (not required hereunder to be borne by the carrier) shall be deemed fully earned and due and payable to the carrier at any stage, before or after loading, of the service hereunder.” [7] Then it goes on to say the whole clause is a clause that the freight might have been deemed or declared due and payable and earned by the company at its option if it had so decided.

The pre-trial order shows that no demand was made for the freight, nothing was done to exercise the option to declare the freight due or payable prior to February 5, 1942, the date on which the carrier gave notice that the voyage was abandoned, and the cases, we say, are clear that after the torpedoing it is too late then to declare that it is. Of

course, any carrier would declare that option after a casualty that might well prevent the voyage, and that the voyage, if it was frustrated, was frustrated on December 24, 1941, when the vessel was torpedoed, and that any demand for freight after that date came too late, that the demand, the exercise of the option must be made at a time prior to the torpedoing of the vessel, prior to the frustration of the voyage.

I think that about outlines the cases. I don't want to argue the matter now. I think that outlines our theory of the case, and the reason we will not put any evidence on at this time is that the pre-trial order covers all that, the documents, and the times, and the dates, and all. I believe it is the intention of Mr. Charles to put on testimony, as I understand it, regarding the circumstances surrounding the reason for the termination of the voyage.

The Court: Mr. Charles, do you wish to make a statement [8] before you put on any evidence?

Mr. Charles: I should like, with your Honor's permission, to do so, and in opening I should like to say it is not my understanding that the testimony which I intend to put on will be entirely limited, although it will deal principally with the point Mr. Finney suggested, that is, the justification of the termination of this voyage short of destination following the torpedoing of the vessel. I think when an attack is made, as in this case, upon the earned freight clause, we should have something as to the background of this clause and its use.

I remember being somewhat shocked upon first finding out that if goods were shipped on a vessel and as a result of a storm the vessel was stranded and had to go into a port of refuge, and had to incur certain expenses, that the carrier could go after the cargo owner and require him to pay a certain proportion of those charges over and above his freight rate, which, of course, is the principle of general average. I think that people who are not fully familiar with the background of the clauses that are usually found in the bill of lading are apt to take an incorrect attitude on a clause of this kind, earned freight, because it says the carrier should have his freight, even though he does not complete the voyage, under certain circumstances. But in the past, for a number of centuries it has become the conception that a shipper of goods becomes a [9] joint venturer, in which not only the carrier, not only the shipper, but the cargo, itself, to a certain extent will participate and shoulder certain of the risks, probably because the hazards are greater, and they were certainly greater in the old days.

We have here the usual type of earned freight clause that says that the carrier, whether the freight is collected before the shipment begins or whether it is collect freight, the carrier is entitled to that freight, whether the vessel is lost or not lost, and even though the voyage is terminated, if it is terminated on the conditions reserved to the carrier in the bill of lading.

Those earned freight clauses have been used for a great many years, and clauses of this type, as we

will point out in the briefing of the case, which I assume your Honor will wish us to do, have been sustained by the courts for many, many years, and in fact as early as 1815 Judge Ellenborough sustained a clause of this character, which held that the ship will be entitled to the freight earned, notwithstanding the fact that the voyage had not been completed by reason of casualty.

In addition to this background, there is the point that this type of a freight clause is not an exceptional clause. It is in virtually universal use, and has been for years, and years, and years, and shippers who are familiar with the trade and familiar with shipping by vessel expect to find this type [10] of a clause in a bill of lading. Even in the present standard bill of lading that is required by the War Shipping Administration to be used in connection with virtually all ocean shipments under the American flag today there is just this same type of an earned freight clause. I simply point that out to show the clause is in universal use.

The opposing counsel's points, as I see them, are three. He states that he believes the earned freight clause we have is not adequate to cover the situation, in that it involved an option which provides that the carrier must exercise that option prior to the time of the loss, to require the freight to be paid. Now, it is our position, and we will elaborate on it later in our briefs, your Honor, the option provision does not relate to the question as to whether the carrier is entitled to the freight, or not. It only relates to the question of whether or not the freight

is to be determined on the basis of weight or measurement. The second time the word "option" is used in that clause simply refers to the time of payment. I would like to just take a moment, if I might. The freight clause reads as follows—I won't read all, but just regarding this option which I am directing my remarks to.

"Full freight to destination on weight or measurement at carrier's option"—the "option" there relates to the weight or measurement—"at declared rates (unless [11] otherwise agreed) and all advance charges against the goods are due and payable to the carrier at its option upon receipt of the goods by the latter."

That refers not to the question of whether the carrier may get his freight whether the vessel was lost or not, but it relates to the time of payment of the freight, whether prepaid or to be collect, and it goes on without any limitation, without any qualification of the word "option," simply that the freight shall be fully earned and due and payable to the carrier at any stage before or after loading, vessel lost or not lost. That is not an unusual form of freight clause. It is a form that differs very slightly, differs with slight variations in nearly every ocean bill of lading. I wish to point out also that the use of the word "option" is also common, but does not refer to the question whether or not the carrier will get the freight, but the question as to the time of payment. I would like to read the comparable provision in the official Government form of bill of lading which is in a recently pub-

lished standard contract form of the War Shipping Administration.

The Court: Mr. Charles, will you permit an interruption?

Mr. Charles: Certainly, your Honor.

The Court: You may proceed.

Mr. Charles: I want to simply point out that this option provision is widely found in bills of lading and I think perhaps—— [12]

The Court: Well, I wouldn't go into too much detail about that, because you will file a memorandum.

Mr. Charles: Yes. If I could just read these few words that will dispose of that point.

The Court: Yes.

Mr. Charles: Clause 15, War Shipping Administration bill of lading, standard form, reads in part:

“Freight shall be payable on actual gross intake weight or measurement or, at carrier's option, on actual gross discharge weight or measurement \* \* \*. Full freight hereunder to port of discharge named herein shall be considered completely earned on shipment whether the freight be intended to be prepaid or to be collect at destination; and the carrier shall be entitled to all freight and charges due him, whether actually paid or not, and to receive and retain them irrevocably under all circumstances whatsoever ship and/or cargo lost or not lost or the voyage broken up as abandoned.”

The second point deals with the fact that Pope & Talbot, being both a lumber manufacturer and

a steamship operator, sold these goods to the libelant and to the plaintiff in the other case prior to the time that the goods were shipped. It is our view that that is entirely irrelevant. The fact that the goods, title was received through these orders that Mr. Finney mentioned and the acceptance of the orders is irrelevant because [13] the libelant and the plaintiff both acquired the ownership of the goods before the shipment was made by Pope & Talbot. A draft was drawn for the payment of the mill price of the goods prior to shipment, and then they were simply turned over to Pope & Talbot as a common carrier, subject to the provisions of the bill of lading and the order and acceptance of the order refers to the fact that the shipment will be made subject to carrier's usual bill of lading.

The third point, and the point which, in my belief, is the one most seriously urged, is that carrier was not entitled to terminate the voyage at San Pedro following the torpedoing of the ship, but was obligated, because the vessel could be repaired and was repaired, to re-load the goods and carry them on to destination rather than to do what they did do, which was prior to the repair of the vessel, sell the lumber as agents for the shippers, and with their consent, and to apply the proceeds to the payment of the freight, and then hold the balance for the cargo owners.

Now, I would like to produce a witness, particularly to cover the question of justification of the termination of this voyage at San Pedro. We con-

tend that the carrier was justified under the circumstances that existed, and pursuant to the privilege reserved in the bill of lading to make that determination and to hold the freight, although the voyage had not been completed to destination. [14]

I will call Mr. Lunny.

---

JOSEPH A. LUNNY,

called as a witness by defendant and respondent;  
sworn.

Mr. Finney: Your Honor, may I say this before the examination goes on, in explanation of why we do not object to this testimony, or to cluttering up the record—we have no jury here. On our theory of the case, of course, as outlined to your Honor, this testimony would be immaterial; that is, we think the case does not turn at all on whether the voyage was properly or improperly terminated. Naturally, we say the clauses of the bill of lading have no application at all in the Guernsey-Westbrook case and it is not a good earned freight clause in the other case, so this testimony as to the reason or justification would be immaterial. I think that statement will cover it, and we will proceed much faster.

Mr. Charles: Well, I would like to be sure that that is clear. I have understood that it is opposing counsel's contention that we were not justified in the termination of the voyage, and that that point is being urged. It was, I believe, at oppos-

(Testimony of Joseph A. Lunny.)

ing counsel's request in the pre-trial order, submitted as an issue in the case. It is our position there is no burden on us except, as I say, I have alleged that the termination was justified. If the point is not involved, perhaps we will dispense with any testimony on the point. [15]

Mr. Finney: What I meant to say, Mr. Charles, was that rather than press the objection in the record we will leave it the Court to determine whether the evidence is material or not when the case is briefed and the theory is developed. That is all I meant.

Mr. Charles: That is quite satisfactory.

#### Direct Examination

Mr. Charles: Q. Mr. Lunny, what is your position with Pope & Talbot?

A. Vice-president, director of operations.

Q. Did you hold a similar position in December, 1941? A. I did.

Q. And in 1942? A. I did.

Q. And since that time? A. Yes.

Q. Prior to January, 1942, could you state briefly, Mr. Lunny, what the extent of your experience in steamship operation has been as far as managing is concerned? A. 25 years.

Q. A great deal of that time you were directly engaged in the operations side of the steamship business? A. Yes.

Q. You served Pope & Talbot and its predecessor in the McCormick Steamship Company?

A. Yes.

(Testimony of Joseph A. Lunny.)

Q. And the Charles R. McCormick Lumber Company, the Delaware corporation?

A. Yes.

Q. As an operating manager I assume you have had wide experience in the handling and discharge of cargoes?

A. Yes. [16]

Q. You are familiar with the problems in the carriage of lumber cargo?

A. Yes.

Q. In December, 1941, was Pope & Talbot engaged both in the operation of vessels and in the manufacture, sale and distribution of lumber?

A. Yes.

Q. Could you tell us in what service the vessels of Pope & Talbot were engaged at that time—let me withdraw that.

Prior to the war, what was the type of service in which your vessels were engaged?

A. Intercoastal and coastwise.

Q. Did you vessels handle lumber cargo?

A. Yes.

Q. That was carried, usually, or at least in part, by deckloads?

A. Yes.

Q. In what direction was the lumber moved?

A. The lumber moved eastward and southward.

Q. Did you carry any general cargo?

A. Yes.

Q. What was the direction of that movement?

A. East and west, and north and south.

Q. Was your company the owner of the steamship Absaroka in the year 1941?

A. Yes.

(Testimony of Joseph A. Lunny.)

Q. Was this vessel operated in the intercoastal service?      A. Yes.

The Court: Where have I heard that name before, "Absaroka?" Was that in collision?

Mr. Charles: Yes, your Honor. That was the vessel that was involved in the collision your Honor heard in this case, the Maui, of the Matson Company, and the Absaroka. [17]

The Court: Yes.

Mr. Finney: This was the voyage following the collision, we understand.

The Court: Is that so?

Mr. Charles: Q. Do you recall whether the Absaroka commenced a voyage shortly after Pearl Harbor, December 7, 1941?

A. Yes; she went to sea on a voyage shortly after that. I believe she was loading at the time of the Pearl Harbor catastrophe.

Q. Was she loading up north?      A. Yes.

Q. She was loading on an intercoastal voyage, was she?      A. Yes, sir.

Q. That is, a lumber cargo going among other places, to the east coast?

A. Solely to the east coast.

Q. That would include the port of New York?

A. Yes.

Q. Did you take any precautions following the outbreak of the war with reference to the ship?

A. We took the precautions that were set forth by the War Shipping Administration and the Navy, such as painting the deckload, painting the ship;

(Testimony of Joseph A. Lunny.)

any precautions that we were advised to take by the Navy before we sailed from Columbia River.

Q. Do you recall whether the sailing date was for December 13?      A. About then.

Q. That is six days after Pearl Harbor?

A. Yes.

Mr. Finney: The 18th?

The Witness: I don't recall the date. It would be more [18] near the 18th.

Mr. Finney: I think that is right.

Mr. Charles: Q. The Absaroka was torpedoed prior to the completion of the voyage?

A. Yes.

The Court: I notice in the pre-trial order mention of a date of December 13th.

Mr. Charles: We may have been mistaken in assuming that the ship sailed on the date the bill of lading was issued. I think that was alleged as the 13th in the complaint.

Mr. Finney: I think the date in the pre-trial order is December 13th, the loading and the issuing of the bill, but the sailing is stated as December 18th.

Mr. Finney: I see.

The Witness: 18th would be more nearly correct, because it is six days down.

Mr. Charles: Q. What was the date she was torpedoed?

A. December 24th.

Q. And where was the vessel torpedoed?

A. Almost to the breakwater at San Pedro.

(Testimony of Joseph A. Lunny.)

Q. Following the torpedoing of the Absaroka what happened to her; did she sink?

A. No. She waterlogged and was towed in by salvage tugs.

Q. Towed in where?

A. Into Los Angeles Harbor.

Q. Was she beached there? A. Yes.

Q. Subsequent to that her cargo was discharged?

A. Yes. [19]

Q. The entire cargo? A. Yes.

Q. Was her damage as a result of the torpedoing extensive? A. Yes.

Q. I would like to show you, Mr. Lunny, what purport to be photographs of a vessel and ask you if you can recognize these as photographs which give us some idea as to the extent of the damage of that Absaroka.

A. Those are the photographs we had taken of the damage after she drydocked and was surveyed. Had she not had a full lumber cargo she would have been a total loss, because with the general cargo she would have sunk, but the lumber kept her afloat.

The Court: Was there more than one hole in the ship? A. Five.

The Court: It is a miracle she did not sink.

A. I beg your pardon. I thought you said holds.

The Court: H-o-l-e.

A. Oh, one. I thought you said h-o-l-d-s.

The Court: One hole in the side of the ship.

(Testimony of Joseph A. Lunny.)

A. Yes.

The Court: About the middle?

A. It was further aft of middle.

Mr. Charles: May I ask that those be introduced in evidence?

The Court: Yes. They may be admitted.

Mr. Charles: As Exhibit 1 of respondent, A, B, C, D, E, F, and G. [20]

The Court: Yes.

Mr. Charles: And to be applicable as the entire record is in both cases.

The Court: Very well.

(The photographs were marked Respondent's Exhibits 1-A to 1-G, inclusive.)

Mr. Charles: Q. You stated the cargo was discharged at San Pedro following a salvaging of the ship. Could you tell us whether the vessel was immediately repaired?

A. Well, the discharge was partly accomplished by lighters in the outer harbor of Los Angeles. Then the vessel was shifted up to the inner harbor and the major portion of the cargo was placed on the dock, there. Subsequently the vessel was drydocked for a survey to determine as near as possible the exact amount of damage. Then bids were called for to repair the damage.

Q. Was there any question at any time as to whether the ship would be repaired?

A. It was questionable in our minds until the amount of damage was actually determined.

(Testimony of Joseph A. Lunny.)

Q. The actual cost of repairs was approximately \$328,000; is that right? A. Yes.

Q. How old a ship was the Absaroka at that time? A. 24 years old.

Q. What type of ship was she?

A. What is known as the West Type vessel, a three-island deep water.

Q. Had those been ordinary peace times rather than war times [21] when the earning capacity and need of the ship was great, would there be any question in your mind as to whether she would have been repaired at all?

A. There would have been a grave question as to whether she would have been repaired or not.

Q. That \$328,000 cost of repairs, I understand that does not include the salvage expense and other costs of discharging and handling of the lumber?

A. That was solely the cost of repairing the ship in the yard.

Q. Could you give us, based upon your experience, a very rough estimate as to how long it would have taken to repair such damage as this under ordinary peacetime conditions?

A. Not to exceed 45 days.

Q. How long did the repairs to the Absaroka in fact take? A. 110 days.

Q. Her repairs were completed on May 9, 1942; is that correct? A. 9th or 11th.

Q. That was the date of the trial run; would that be any indication to you?

(Testimony of Joseph A. Lunny.)

A. Oh, she didn't immediately go to sea thereafter, but May 9th or 11th.

Q. Could you tell us what shipyard conditions were in the San Pedro area at the time the Absaroka was torpedoed, and during the next few months?

A. Well, naturally, immediately after Pearl Harbor considerable confusion existed in our industry; that would include confusion in the shipyards. We gave the [22] ship to Bethlehem with the definite understanding on their part that at any time the labor may be taken away from the ship and the ship would lie idle, or if the vessel was occupying a drydock they may have to put her in the water, and if something more urgent came along and if the Navy, or the Army, or the War Shipping Administration should tell Bethlehem that they had to repair, let's say, a tanker of the Navy or the Army, or a vessel in the War Shipping Administration Service that was more urgently needed than the Absaroka, the Absaroka repairs would cease and she would have had to lie idle until such a time as repairs were again started on the Absaroka.

Q. All the repair work at that time was being done on priorities?

A. In fact, it has all been done since that time. The Absaroka, in her very damaged condition at that time, certainly would be a ship that the repairs would have been deferred on with preference to a vessel that was actually engaged in war

(Testimony of Joseph A. Lunny.)

shipping if the vessel was more needed than she would be. Say a vessel that might handle troops or perishable cargoes, so while we had the estimate of the time from the shipyard, and while we were quite sure it would take longer than even the estimates, at least we didn't know at that time just how long that vessel would be in repairing, and it was for that reason we abandoned the voyage, because we could see satisfactorily with the information we then had at hand, we could not determine how long she would be in repairing, and we thought in the interest of the [23] cargo and all concerned it was best to abandon the voyage, which we did, and the firm then gave notice of abandonment of the voyage.

Q. That notice of abandonment was given on what date?

A. I believe about the 6th of February; I think the 6th.

Mr. Finney: February 5.

The Witness: February 5?

Mr. Charles: Q. You were at Wilmington about one or two times during the discharge of the Absaroka's cargo?

A. I was not there during the discharge, but we sent a man down from Portland who was very familiar with lumber handling, and our port engineer was there, and the man representing the underwriters of the cargo interests flew out from New York. It was the consensus of opinion of the cargo underwriters here, as well as the man

(Testimony of Joseph A. Lunny.)

who flew out from New York, that we should forthwith start disposing of that lumber, because if we had piled it up in the yard, which we eventually did, and let it rest there for a matter of months, lumber would deteriorate very quickly.

Q. You mean from the weather?

A. From the weather, and what we call burned piles, because we didn't have enough labor to pile the lumber up to protect it from burning. Obviously, the Coast Guard and the Navy were very apprehensive at that time of conditions in the harbor. They would only allow us to pile it so high, and the result of all this was that we would have had to pile this lumber piece to piece. If it had laid there [24] for months it would have burned, as we use the term.

The Court: Q. What do you mean, "burn?"

A. Well, actually it is a dry rot.

Q. From the sun?

A. No; because one piece is right against the other. This vessel, after having been torpedoed, mostly the lumber was wet. If you piled lumber piece to piece that is wet and leave it there for a matter of months, that is the condition that will exist. That is why you see in lumber yards when lumber is stored for a long time, the lumber is running this way, one tier of it, with one-inch by two-inch in between, and that is put there to allow the air to go through. The underwriters and ourselves, from our familiarity with the lumber business we knew, first of all, we didn't have the labor

(Testimony of Joseph A. Lunny.)

and, secondly, the Coast Guard would not permit the high piling, and, thirdly, the cost of it would have been excessive.

Mr. Charles: Q. What was the condition of the lumber upon discharge? Was the discharge made in the usual way, by lots?

A. It was impossible to discharge it except certain portions of the lot as the vessel was loaded; a lot was damaged with oil, a lot was damaged by salt water.

Q. Was any of the lumber oil-soaked?

A. A lot of it.

Q. You were down there prior to the time the Absaroka's repairs were completed, were you?

A. Yes.

Q. You had regular reports on the lumber from men serving you and men who were there on the ground? A. Yes. [25]

The Court: Q. What kind of lumber was it?

A. Douglas fir, green lumber.

Q. What develops further, would it warp after being wet?

A. Yes, your Honor. Whenever that Douglas fir or hemlock becomes soaking wet at any time in salt water and then exposed to the sun for a matter of months and months, it is very likely that a certain degree of shrinkage develops.

Q. You say that it will rapidly deteriorate?

A. No; I was thinking about over the course of months.

Q. How long?

(Testimony of Joseph A. Lunny.)

A. Three to six months. Of course, it would be hard to say just how long it would take, because that would depend upon the weather. You might run into a long hot spell, or you might run into rainy weather. It is difficult to determine just in so many days, in how many days this condition would come about.

Mr. Charles: Q. Well, it was, of course, approximately five months before the vessel's repairs were completed; you said in May of 1942?

A. Yes. I was thinking about the three to six months subsequent to the date of abandoning, which was in February.

Q. You determined upon a plan to sell the lumber on behalf of all concerned, did you?

A. Yes.

Q. Did you consult at all with the cargo owners, or their representatives, in determining whether the lumber should be sold, or what should be done with it?

A. Well, the determination to [26] sell the lumber really originated with the owners of the lumber.

Q. That is, the sale of the lumber?

A. Yes, the sale of the lumber. I know they urged the lumber be disposed of because no one could contemplate when the repairs could be completed, when the vessel could go on the voyage; if or when she was repaired whether she could go on the voyage at all.

Q. What charges were there running against

(Testimony of Joseph A. Lunny.)

the lumber during that period of time that it was on the dock, there?

A. The ordinary storage charges. May I qualify that? I said the ordinary storage charges. The ordinary storage charges plus the watching expense imposed upon us by the Coast Guard; because of the condition of the lumber, being oil-stained, they considered it a fire hazard and they asked us to get it out of the way as soon as we could.

Q. Am I correct in understanding you stored it as agents for the cargo owners? A. Yes.

Mr. Charles: I might say, in fairness, that we are not making the contention that they waived anything by reason of an agreement that the lumber be stored, but we simply want to point that out to give your Honor the background of this as it fits into the reasonableness of the company's decision to terminate the voyage.

Q. You sold the lumber as agent for the cargo owners. What was done with the proceeds?

A. The proceeds were forwarded to the owners of the lumber. [27]

Q. Was that done directly, do you recall, or do you recall whether it was done through the adjusters?

A. I don't recall. I believe it was done direct, but I won't be so sure.

Q. You deducted your freight from those proceeds? A. Yes.

Q. Was any of the lumber lost overboard, Mr. Lunny, at the time of the torpedoing?

(Testimony of Joseph A. Lunny.)

A. Yes.

Q. You mentioned a moment ago that you were not even certain that the voyage could be completed after the ship had been repaired. I wonder if you would state to the Court what you had in mind at that time in that connection.

A. Well, there were no other intercoastal voyages being at that time undertaken. The Government directed vessels into other more essential routes, and while there was no advice from the Government to us at the time we abandoned the voyage that she was wanted for that service, or that she was requisitioned for their service, we felt reasonably certain that the vessel would be ordered by the Government to go in some other direction other than intercoastal. No one could say what the condition would be at the time she was repaired. She may well have continued on her voyage.

Q. Immediately prior to the time you made your decision to terminate the voyage at San Pedro, was there any information that you had, or the public had, which indicated to you that there was any justification in the prosecution of the remainder of the intercoastal voyage from submarines?

A. Definitely. [28]

Q. That was February 5, 1942. The Japanese submarines had been on the Pacific Coast, of course, about the time of the torpedoing of the Absaroka?

A. Exactly at the time.

(Testimony of Joseph A. Lunny.)

Q. And other vessels had been torpedoed, too, is that correct?      A. That is right.

Q. Completion of the intercoastal voyage would mean going through the Canal, wouldn't it?

A. Yes.

Q. Then the ship would go on through the Caribbean, along the Atlantic Coast, to her point of destination, New York, and other ports?

A. Yes.

Q. Do you know whether there were any German submarine activities in the Caribbean and on the Atlantic Coast up to that time?

A. The worst menace from submarines at that time was in the Caribbean. On the Pacific Coast, of course, as you say, we had the Japanese menace on the whole Pacific Coast, and on the whole Atlantic there was the German menace, but the Caribbean was the worst. We knew of a vessel that late in January was on her way to Trinidad, and was diverted to San Jose for reasons best known to the Navy. Then we had knowledge that at the time it was overdue at San Jose, and has never been heard from since. I don't think there is any question about the menace, at all, of submarines at that time, because there were too many sinkings, especially in that territory between the Panama Canal and the North Atlantic.

Q. Do you know whether there was any convoying of vessels in [29] any trade in which the American vessels were engaged in the two or three months that followed Pearl Harbor?

(Testimony of Joseph A. Lunny.)

A. There was conveying in certain directions. I am not fully familiar with all of the convoys that were undertaken, naturally I would not be, but it is more than reasonable to assume if the Absaroka started out from Los Angeles on her own that she would not have a convoy all the way to New York.

Q. Did you have any reason to believe at the time you made the decision to terminate the voyage that there would or would not be a convoy available when the Absaroka completed repairs?

A. My definite determination was there would not be a convoy, because there was no convoy for the steamer when the West Ives was lost in the Atlantic.

Q. What official of your company made the decision to terminate the voyage of the Absaroka at Wilmington? A. I did.

Q. Did you consult with the master of the ship at all? A. I did.

Q. What was the master's name?

A. Prendel.

Q. Will you state briefly, although I think you have possibly mentioned them all, upon what considerations you based your decision to terminate the voyage?

A. Based on the fact that at the time the known date when the vessel would be ready to complete her voyage was a matter of considerable conjecture, but to our way of thinking it could well be a matter of months and months, and we then aban-

(Testimony of Joseph A. Lunny.)

doned the voyage and reserved to [30] ourselves all the rights under the bills of lading.

Mr. Charles: I think that is all.

Cross-Examination

Mr. Finney: Q. When was the lumber sold, Mr. Lunny?

A. The lumber on board the Absaroka?

Q. Yes. When was the lumber cargo of the Absaroka sold?

A. Well, it was five million feet of lumber on board. I suppose it was sold on various dates. I wouldn't know the exact date each lot was sold.

Q. Well, do you know over what period of time?

A. No, I don't know.

Q. Do you know when the first sale was made?

A. No, I don't, but the records will show, and we could produce those if you want them.

Q. It was about February 5, 1942?

A. I beg your pardon. I thought you meant originally sold.

Q. Oh, no, no. I mean after the torpedoing.

A. To the best of my knowledge, none was sold until the voyage was actually abandoned.

Q. It was after that?

A. I misunderstood. I thought you meant the original sale from the mill.

Q. The determination to sell the lumber was made about February 5, 1942, and it was actually sold after February 5, 1942?

A. That's right.

Q. On that date you had no advice, you say,

(Testimony of Joseph A. Lunny.)

from the Government, [31] that they would want to take the Absaroka into Government service?

A. That's right.

Q. It was not a troopship or a ship that was vitally needed at that time?

A. No, she was not vitally needed at that time, to the best of my knowledge; at least, we had no advice they wanted the vessel. Of course, I must say after they took her they realized how good she really was, and because of the peculiar rigging of the vessel, being the only one on the West Coast, in this country, which carried more piles than any other five vessels put together.

Q. She was primarily a lumber ship?

A. Yes.

The Court: What was there about her that was different?

A. Well, when we bought her I put four masts on her. She was able to carry long piling, that is just what Pearl Harbor needed. She is running there yet.

Mr. Finney: Q. You chartered her to the Government about May 9, after she was repaired?

A. We had notice of intention to charter prior to that time.

Q. Was she requisitioned or chartered to the Government after May 9th or on May 9th?

A. The wire received at that time was like a lot of other wires received at that time. It could be considered to mean either an offer to charter or a requisition.

(Testimony of Joseph A. Lunny.)

Q. That you received some time in April—it was dated April 14th, wasn't it?

A. I believe it was thereabouts, but I don't know yet whether it was a requisition wire or an offer to charter. [32]

Mr. Finney: The pre-trial order covers that, your Honor.

The Court: Yes.

Mr. Finney: The wire is in evidence.

Q. Were there German submarines operating in the Caribbean—you say that was the worst danger along about this time?

A. Yes, it was, because they were torpedoing tankers out of the Gulf and they were supplying, or trying to supply the vessels coming up with bauxite, from which they make aluminum.

Q. That did not apply only to vessels of the United States, but it applied to English, French, Norwegian, Greek, or any other vessels that were in those waters?

A. I don't know how selective they were in their sinkings—I don't mean to be facetious, but they had their own ideas as to who they were going to sink.

Q. What I mean is, Germany was at war with England and France before we ever entered the war.

A. As to England and France, I will say positively, yes, but I don't know as to Greeks or any others.

Q. Well, confine it to English and French, and

(Testimony of Joseph A. Lunny.)

you would say there was a submarine campaign in the Atlantic Ocean before we were in the war, against the English and the French?      A. Yes.

Q. A great number of English ships and French ships were lost in the Atlantic before we were in the war?      A. Yes. [33]

Q. And in the Caribbean, too?

A. I don't know about in the Caribbean before the war.

Q. You were in the shipping business, you were watching the shipping situation during all this time, weren't you?      A. Yes.

Q. Do you have any idea of the British ships lost say during 1941 before we were in the war?

A. No. We have a mass of figures in our office but I haven't got the figures in my head right now. I do know this, I don't know whether it would be helpful in the questioning or helpful in the answers to the questions, but up until the time we engaged in the war I do know our vessels ran down through the Caribbean and ran back that way and never were harmed until Pearl Harbor. In other words, we took vessels out of the intercoastal trade and sent them down through there and they carried essential cargo there and brought home linseed, and they never were bothered on that route. The West Ives was the first occurrence after Pearl Harbor.

Q. Prior to Pearl Harbor there hadn't been any one that had been intentionally torpedoed—I mean of our ships—before December 7th?

(Testimony of Joseph A. Lunny.)

A. I was just saying there were not, to the best of my knowledge. I knew of no cargo ship that was torpedoed.

Q. You say after Pearl Harbor, that was when you began to take precautions and expected torpedoing?

A. Yes. We placed war risk as to everything we had on the morning of Pearl Harbor. At ten o'clock in the morning from home I placed war risk insurance [34] on every vessel we had, and the cargoes they had.

Q. What?

A. Carried war risk insurance, I placed war risk insurance.

Q. Were there British tankers operating in the Caribbean before December 7, 1941, or French?

A. I don't know.

Q. You don't know whether there were any losses before that?

A. British or French, I don't know.

Q. You do know that on the Atlantic, though, before we were in the war, before December 7th, that is, without knowing the exact figure, you know there was a torpedo boat campaign in the Atlantic?

A. Yes. The only reason I said I didn't know about the Gulf is because you said tankers. I can't say British or French tankers. I would say British and French ships in the Gulf, or in the Caribbean, would be as much subject to attack there as in the Atlantic. You asked if I know of any tankers. I didn't know of any tankers specifically.

(Testimony of Joseph A. Lunny.)

Q. But ships generally, you did know that in the Caribbean and in the Atlantic before we were in the war?           A. Yes.

Q. Being torpedoed?           A. Yes.

Mr. Finney: That is all.

### Redirect Examination

Mr. Charles: I want to ask one or two questions. You were questioned, Mr. Lunny, regarding whether your ship was requisitioned or whether she was chartered, and you said you were somewhat uncertain as to whether she was being chartered [35] or requisitioned. I want to show you a wire, copy of a wire dated April 14, 1942, addressed by the War Shipping Administration to the McCormick Steamship Co.

Mr. Finney: Isn't that the one in evidence?

Mr. Charles: That is the one in evidence.

Q. I ask you if you would read that wire to the Court:

A. "The War Shipping Administration requires use of your vessel SS. Absaroka and offers to charter the same for about one year with option in either party to cancel at termination of any voyage of fifteen days prior written notice stop Charter hire to be determined in accordance with Maritime Commission General Order Number Forty-nine and in reliance on vessel data information supplied by you stop Trading limits to be worldwide but marine insurance within limits of American institute trade warranties March Nineteen

(Testimony of Joseph A. Lunny.)

Forty Two stop However have your marine policies provide automatically help covered for worldwide trading premiums for trading beyond such limits account administrator stop Insurance values to be in accordance with Maritime Commission General Order Number Fifty Three plus actual value consumable stores and supplies stop Delivery Los Angeles April when ready after completion repairs redelivery at US Pacific Coast port formal charter agreement covering foregoing will be mailed shortly shortly stop Charter rates prescribed by [36] General Order Forty Nine and insurance values prescribed by General Order Fifty Three now being reviewed stop If such rates or values are modified on or before April Fifteen you shall have the election of receiving the benefit of such modifications stop Form of time charter following form published in Administrators General Order Number One with certain modifications now being prepared stop If charter tendered you or rates or valuations therein prescribed is not satisfactory and you so advise us within ten days of receipt thereof we shall proceed under section nine zero two or take over the vessel as of time of delivery."

The only reason why I said I did not know whether that was an offer to charter or requisition was simply because their terms are silent and it says in the bottom part of the wire that if when we get the charter we don't like it, they will requisition the ship. All I say is, at the time of receiving the wire I did not know whether it was

(Testimony of Joseph A. Lunny.)

an offer to charter or whether it would ultimately result in an offer to charter, or a requisition, and in some respects I don't know how, because when it comes to re-negotiating, they are talking about a requisition or a voluntary charter.

Q. Is the section referred to here the one that gives the Government the power to requisition ships and to pay just compensation?

A. When the President declared a national emergency [37] to exist, they might either through purchase or charter requisition your property at an agreed value, or at an agreed rate, or failing to agree as to the value and rate to requisition and pay you just compensation.

Q. You mentioned the shipments that were made in this case were collect freight shipments. Can you tell us whether that was a common practice of your company to ship with freight collect, that is, freight payable at destination?

A. It is very common practice in our company as well as all the intercoastal trade. It was also common with the lumber trade. The fact of the matter is it was so common it became a burden at one time. The carrier would accept the lumber at the mill and carry the lumber to the East under bill of lading like ours, or substantially like ours, and drop the lumber on the dock, and, naturally, the carrier wouldn't surrender the lumber until the man produced the bill of lading.

When the market for lumber became very dull, we would ship to some consignee, such as these

(Testimony of Joseph A. Lunny.)

people here, who are in court now, and they would pay for the price of the lumber at the mill. We sent a bill of lading and they wouldn't go down to pick the lumber up for maybe three or four months while they were negotiating the sale to somebody else, so the steamer lines were out their freight money for a matter of months and months, and it was really a serious situation as far as lumber, because it was the only cargo in the trade that was handled that way. [38] We had other shipments west on the same bills of lading where we considered the freight was earned, and we did not collect until we came out here. Naturally, if a man had some radios in a cargo, for instance, he would come down and pay the bill and take his radios, or any other cargo, but with lumber being a commodity that it is, and was susceptible to a number of transfers between the shipment from the mill and the ultimate user of the lumber, it offered of delay in ultimate delivery. For instance, Blanchard may have bought the lumber and taken his documents, and he may have sold it to the man across the street, who might sell to the man down the street, and the man who gets the bill of lading was the man who packed the lumber off the dock. Storage rates were low at this particular dock in New York, I think Sixty-fifth street dock at Brooklyn. I should say, taking all that into consideration, it was a very common practice.

Q. In your judgment, if you had insisted, your company insisted upon getting all the freight pre-

(Testimony of Joseph A. Lunny.)

paid, would that have had any effect upon your competitive position in the industry?

A. It would, because the other lines were not demanding that the freight on lumber be prepaid. For instance, our lumber division, we sold lumber and shipped it out on other lines—I don't recall the lines now, but I know them all. We used American-Hawaiian and other lines. They did not demand advance on the freight. They carried under the same conditions [39] as we did. I say "we". I mean our steamship division carried it for the lumber division, not exactly the same bill of lading, but with the same option in it as to when the freight was payable, but in our estimation there was no question about when it was earned.

Mr. Charles: I think that is all.

Mr. Finney: That is all.

(A recess was thereupon taken until 2:00 o'clock p.m.) [40]

---

Afternoon Session, April 27, 1945, 2 p.m.

GEORGE KENDRICK,

called as a witness by respondent and defendant;  
sworn.

The Clerk: Will you state your name?

A. George Kendrick.

Direct Examination

Mr. Charles: Q. Mr. Kendrick, in what capacity are you employed with Pope & Talbot?

(Testimony of George Kendrick.)

A. District sales manager and manager of the lumber division.

Q. Were you employed in a similar capacity in December, 1941?           A. I was.

Q. Have you had experience in the sale of lumber, and in the company's lumber operations?

A. Yes.

Q. That extends over some years?

A. About 20.

Q. Are you familiar with the Pacific Coast lumber practices?           A. Yes.

Q. Was it a common practice in 1941 to handle sales of lumber and to transport the lumber in the manner in which the shipments here in suit were handled?           A. That's right.

Q. Was it a common practice when Pope & Talbot sold lumber to a New York purchaser for the purchaser to pay the mill price, rather, to draw a draft for the mill price and then for Pope & Talbot to arrange the transportation of that lumber on its own vessel, with the freight paid upon arrival of the goods?           A. Yes. [41]

Q. I wonder if you would explain to us the basis upon which lumber was sold by your company.

A. Well, in the intercoastal trade there are three methods of selling, FAS vessel mill, free alongside vessel at the mill; C&F, cost and freight; and CIF, cost, insurance and freight. It is generally recognized in the trade, and according to the West Coast

(Testimony of George Kendrick.)

terms of sale, and even those who sell C&F, the price basis is FAS.

Q. Could you explain what you mean by that?

A. Well, the industry at that time was operating under a basic price list. That is a price list put out by the Intercoastal Lumber Distributors' Association and the West Coast Lumbermen's Association, which is the association of the manufacturers in the case of the West Coast, and an association of the distributors in the case of the Intercoastal Lumber Distributors' Association. The terms of sale, the general practices of those two associations were carried on by practically the entire industry.

Q. Now, you have West Coast Distributors' Association—is that the name of it?

A. Intercoastal.

Q. Intercoastal Lumber Distributors' Association; is that made up of just the carriers, or does that include the wholesaler in the West?

A. That is made up only of the distributors who manufacture and sell in the Atlantic seaboard country. It has nothing to do with the carriers.

Q. You referred to a document establishing uniform terms of sale. What do you call that document?

A. That is the West [42] Coast terms and conditions of sale, which is the industry's basic terms and conditions of sale, and covers all phases of lumber distribution.

Q. Is that a published document?

A. Yes, it is.

(Testimony of George Kendrick.)

Q. Can you tell us how that is distributed?

A. Well, it is available to anyone within the industry, or anyone that is interested in the marketing of lumber, and can be secured from the West Coast Lumbermen's Association.

Q. Does that provide for uniform terms of sale?

A. Yes.

Q. Do you have another copy of that with you, Mr. Kendrick?

A. Yes, I have.

Q. I would like to show you a document entitled, "Official West Coast Standard Sales and Shipping Practices for Douglas Fir, West Coast Hemlock, Western Red Cedar and Sitka Spruce Lumber," which is dated October 15, 1940, and states it is "Published and Distributed by West Coast Lumbermen's Association," and ask you if that is the document to which you are referring.

A. That's right.

Q. You say that has a wide distribution?

A. Yes.

Q. This West Coast Lumbermen's Association, was your company a member of that association?

A. Yes.

Q. Do you know whether the Blanchard Lumber Company is a member of this association?

A. Not of the West Coast Lumbermen's Association.

Q. Do you know if it was a member of the other association you [43] mentioned?

A. They were; I understand they are members

(Testimony of George Kendrick.)  
of the Intercoastal Lumber Distributors' Association.

Q. How about the Guernsey-Westbrook Company?      A. I understand they are, also.

Q. The last of the associations?

A. The Lumber Distributors' Association.

Q. Do you know whether this is in common use among the people who purchase lumber from your company?      A. Yes, it is.

Q. I want to ask you whether there are any provisions in these West Coast terms having to do with shipments comparable to the shipments which are in suit here.

A. I think you will find it in paragraph J under "Water Shipments." Water shipments are all covered——

"All sales of West Coast stock, where prices include cost of delivery, are made FAS plus freight and/or other charges in effect when sale is made."

Q. Can you tell us whether there was any reference there to the bill of lading?

A. Paragraph J specifies:

"All terms and provisions of ocean steamship bill of lading are assumed by buyer in acceptance of bill of lading covering shipment."

Under paragraph I it is also specified that,

"Any taxes, State or Federal, levied or assessed on account of freight charges, or any increase in freight rates or other delivery costs as published by the Intercoastal [44] Steamship Freight Association, the Pacific Lumber Carriers' Association,

(Testimony of George Kendrick.)

the Gulf Intercoastal Conference, or any other common carrier," and so forth.

Mr. Charles: I should like to offer this document in evidence as Respondent and Defendant's Exhibit 2.

In making this offer, I wish to make it clear, however, that it is our contention that the terms under which these sales were made and the forms of the orders which were used have, in our judgment, no bearing upon the issues involved here, because of the fact that the bills of lading and the bills of lading provisions alone are controlling, but the contention has been raised and we therefore wish to offer this in evidence.

Mr. Finney: I will object upon the ground it is incompetent, irrelevant, immaterial, and not binding on the parties we represent. That would be incompetent to vary the terms of the contracts that were made in this particular case.

The Court: Well, I don't suppose these are offered for the purpose of establishing a contract. You did not offer it for any such purpose?

Mr. Charles: No.

The Court: You are offering it merely to show the circumstances surrounding the entire transaction?

Mr. Charles: Yes, that is correct, and for the further purpose of showing the terms of the carrier's bill of lading [45] are supposed to apply to all shipments, regardless of character.

The Court: Mr. Finney, I am unable to see

(Testimony of George Kendrick.)

clearly how I could sustain or overrule your objection. Perhaps I had better permit it to be marked as an exhibit, reserving my ruling upon it.

Mr. Finney: I would think so, your Honor.

The Court: Until I decide the case.

Mr. Finney: I would think so. I understood the statement was it was offered for the purpose of showing that the orders and acceptances and the documents we rely on had no bearing on this transaction. From that statement I take it that it is being offered to vary the terms of the contracts involved here. I think your Honor's suggestion is a good one about reserving the ruling.

The Court: Yes.

Mr. Charles: That will be agreeable.

The Court: Let that be the understanding. I suppose when the reporter will finish taking this testimony he will transcribe it for the use of the Court?

Mr. Charles: Yes.

Mr. Finney: Yes, surely, your Honor.

Mr. Charles: We will be pleased to do that.

(The document was marked Respondent and Defendant's Exhibit 2.)

Mr. Charles: Q. Mr. Kendrick, when sales are made by [46] Pope & Talbot of lumber, what is the basic price upon which the transaction is made?

A. The FAS mill price, or FOB carrier mill price.

Q. What is the mill price; is that the sale price of the lumber at the mill? A. Yes.

(Testimony of George Kendrick.)

Q. Is that price a price which is established by any publications that are distributed to the trade?

A. Well, essentially it is controlled by OPA regulations.

Q. With reference to December, 1941, did you have any established price?

A. We had an established basic price.

Q. What was that basic price?

A. That was the basic price that was formulated by the Intercoastal Lumber Distributors' Association and the West Coast Lumbermen's Association.

Q. Did all of the lumber manufacturers charge the same price, mill price?

A. No. They used the same pricing formula; in other words, if the basic price was \$27, some mills were over the price and some were under the price. There was no firm price with all the mills, but there was a firm formula that they all used.

Q. What was that formula?

A. It was the Atlantic Coast Differential list.

Q. If you wanted to determine what your selling price was of lumber which was moving to New York, how would you apply that basic formula, how would that apply to the determination of the sales price?

A. If we have to make the price you would [47] use the firm price list, firm basic list, take the basic list for each grade and size and length, add your

(Testimony of George Kendrick.)

freight charges, and in case where it was a CIF sale, add your insurance charge, or any other forwarding charge.

Q. Could one also determine what the price would be for lumber that is sold for delivery in Los Angeles, or sold for delivery in New York, or New Orleans by taking the basic mill price and then adding the freight to it? A. Yes.

Q. What is this price list called?

A. Atlantic Coast Differentials.

Q. This document which is compiled and distributed jointly by the Intercoastal Lumber Distributors' Association and the West Coast Lumbermen's Association—is it? A. Yes.

Q. And this document, dated September 1, 1939, was that in effect in December, 1941?

A. Yes, that's right.

Q. This Intercoastal Lumber Distributors' Association, is that the one which you mentioned that Guernsey-Westbrook and Blanchard belong to?

A. That's right.

Q. Do you know whether this document was widely distributed and used among lumber dealers, wholesalers, in December, 1941?

A. On the Atlantic Coast, yes.

Mr. Charles: I should like to make a similar offer of this document in evidence.

The Court: Very well.

Mr. Charles: For the purpose previously stated.

The Court: It may be admitted upon the same

(Testimony of George Kendrick.)

understanding that the other document was admitted, and upon the same objection.

Mr. Finney: Yes, your Honor.

The Court: The ruling will be reserved.

Mr. Charles: That will be Respondent's No. 3 in one case and Defendant's No. 3 in the other.

(The document was marked Respondent and Defendant's Exhibit No. 3 in evidence.)

Mr. Charles: Q. Mr. Kendrick, in view of what you have said, if your vessel was to carry lumber to Los Angeles and discharge it there, would that lumber have a higher value in Los Angeles than at the mill? A. Yes.

Q. If you contracted to carry lumber to New York and you carried it to Los Angeles and deposited it under ordinary conditions would the value of that lumber be higher than it would have been at the mill? A. Yes.

Q. But it would be lower, or less valuable than at New York? A. That's right.

Q. You are familiar with the documents which are ordinarily used in connection with a purchase of lumber from your company, are you?

A. Yes, sir.

Q. Now, if, as was the case of some of these shipments, an order bill of lading is obtained, or a draft and an order bill of lading was obtained by Guernsey-Westbrook from you, and the [49] bill of lading negotiated by Guernsey-Westbrook to another party, would that other party receive the Pope & Talbot order form, or acceptance of order form?

(Testimony of George Kendrick.)

A. No.

Q. What document would he receive?

A. He would receive a Guernsey-Westbrook invoice and the bill of lading, which would be endorsed over to him by Guernsey-Westbrook, or Blanchard, or anyone else in the trade.

Q. Would that bill of lading, if the freight was collect, as here, would that bill of lading carry some indication that the freight was collect?

A. I did not quite understand that question.

The Court: Read it.

(Question read.)

A. Yes, it would.

Mr. Charles: Q. It would show whether it was prepaid or collect? A. Yes.

Q. From your background in the handling and sale of lumber I should like to ask you whether the form of sale that is made CIF or FAS, or any other form, has anything to do with the question as to whether the freight is earned freight, whether the freight is subject to an earned freight clause or not?

A. Well, as far as the sales are concerned, it would not, other than the provisions, other than the stipulations in the bill of lading.

Q. The provisions of the bill of lading, in your judgment, would cover? A. That's right.

Q. Was Pope & Talbot a member of any steamship conference in December, 1941?

A. McCormick Steamship Division of Pope & Talbot, yes.

(Testimony of George Kendrick.)

Q. Pope & Talbot is one corporation.

A. Yes.

Q. You are referring to one division of that company? A. Yes.

Q. Did that Intercoastal Conference have any uniform practice with respect to the lumber business? A. Yes, they did.

Q. Do you know from your experience whether the other companies carried their shipments on substantially the same basis?

A. The majority of them did, yes.

Q. Do you know from your experience whether other companies had earned freight clauses in their bills of lading?

A. Yes; I have seen other steamship bills of lading that use it. There is the Intercoastal Freight Association.

Q. Was lumber carried on a collect freight basis very often?

A. I think it was the practice of the trade at that time.

The Court: How long had that practice existed?

A. Many years.

The Court: Ten years?

A. Yes; to my knowledge longer than that. It was a desirable way with the dealer assisting his financing by having the freight, which in some instances was a sizable part of the delivery price, carried by someone other than himself or his banking connection.

Mr. Charles: Q. That is, if a man had \$100,000

(Testimony of George Kendrick.)

to deal with and he could purchase lumber and not have to pay the very [51] substantial freight on it at that time, he could buy that much more lumber?

A. Yes.

Q. Was that the reason why they did it?

A. Generally, yes.

Q. In some cases did you sell lumber and was arrangement made to ship or forward it on some other steamship line independent of Pope & Talbot?

A. Yes.

Q. If a purchase was made by you of lumber to be shipped on the American-Hawaiian ship would the freight be prepaid or collect, do you know?

A. Generally it would be collect.

Mr. Charles: That is all.

#### Cross-Examination

Mr. Finney: Not knowing what the Court's ruling will be ultimately on them, I would like to bring out one other clause—I think that document generally was introduced.

The Court: Yes; that is what I understood.

Mr. Finney: This clause E, Mr. Kendrick:

“(General: Applies to all sales.) Freight and/or other forwarding charges are net cash and payable by consignee upon arrival.”

That was the uniform practice, was it?

A. Yes.

Q. You said under your practice at the time the gross sales price, that is the price delivered in New York, included a base price at the mill, plus the freight—is that it?

(Testimony of George Kendrick.)

A. Plus the freight, or plus the freight and insurance.

Q. Yes. Lumber, you say, was more valuable in New York than [52] Los Angeles? A. Yes.

Q. That is the reason why you paid the freight, to get it there? A. That's right.

Q. And it was uniform practice to send the lumber, or make the bill of lading, or make the contract with the freight collect upon arrival of the lumber at destination? A. Right.

Q. The reason you say for that was that he, the purchaser of the lumber, did not have to pay the freight until he received the lumber; in other words, he was not out the freight until the lumber was delivered to him? A. That is what I mean, yes.

Mr. Finney: That is all.

The Court: Is that all, Mr. Charles?

Mr. Charles: I would like to ask just one question of Mr. Lunny, if I may.

---

JOSEPH A. LUNNY,

recalled as a witness by Respondent and Defendant, having been previously sworn, testified as follows:

Direct Examination

Mr. Charles: Q. Mr. Lunny, you have called my attention to the fact, I believe you said that under some circumstances the market value of the lumber at New York might not be more than the

(Testimony of Joseph A. Lunny.)

market value at Los Angeles. I wonder if you would explain that.

A. Well, I did not think that the answer was as clear as it might be, in that the freight rate governing any [53] particular shipment of lumber would not necessarily make, or affect the value of the lumber. It would be the competitive conditions existing at the time. In other words, when the Los Angeles building boom was on the freight rate was higher to Los Angeles; that, plus the fact it was harder to get space to Los Angeles makes the value of the lumber at Los Angeles more expensive than the lumber at New York. That condition may well prevail throughout the country. The only point I had in mind is the freight rate does not necessarily make the value of the lumber higher or lower.

Q. The general price applies, the price is arrived at by the formula explained by Mr. Kendrick—that is, the mill price plus the freight?

A. The mill price applies when shipment was made, but in New York you may have competition from other lumber there.

Q. That would give you a different basic price, say for Southern pine or some other lumber?

A. Yes. Then the freight rate may vary on intercoastal lines, as well as on coastwise lines based upon the amount of lumber available for shipment to respective ports.

Q. Can you tell us whether the form in which the sale is made has anything to do with whether

(Testimony of Joseph A. Lunny.)

the freight is to be deemed earned, under the provisions of your bills of lading?

A. None, whatsoever.

Mr. Charles: I think that is all. [54]

Mr. Charles: If the Court please, I was going to call Mr. Hays, who is here, the average adjuster who made the average adjustments in this case, for the purpose of establishing the amount of lumber, or the amount of freight applicable to the lumber which was lost overboard at the time, or immediately after the torpedoing, and which is an amount that should be deducted from the amount claimed in the suit; that is, suit was brought for full freight—Will you stipulate that the claim should not include the freight on lumber that was lost overboard? Am I correct?

Mr. Finney: On our theory, it wouldn't make any difference whether the lumber was lost overboard or not carried. I will stipulate with you on the figure that it should be.

Mr. Charles: Yes. Well, may I call Mr. Hays to give us the figures?

The Court: Yes.

Mr. Finney: I will stipulate, but not as to the effect.

## WALTER G. HAYS

called as a witness by Respondent and Defendant; sworn.

The Clerk: Will you state your name to the Court?

A. Walter G. Hays.

## Direct Examination

Mr. Charles: Q. Mr. Hays, you are employed by Marsh & McLennan, insurance brokers, and average adjusters, are you? [55] A. Yes.

Q. Were you so employed in December, 1941?

A. Yes.

Q. Did you have anything to do with the handling of the adjustments on the steamship Absaroka following her torpedoing on December 24, 1941?

A. Yes. I prepared the general average adjustments or general average losses arising from that casualty.

Q. Did you have any occasion at that time to make any determination as to the amount of freight which was applicable to the lumber which was lost overboard, or estimated to be lost overboard at the time of the torpedoing?

A. Yes. In our general computations and allocation of the proceeds realized from the sale of the lumber we computed the shortage and allocated the shortage to the various shipments as originally made, and at one time we did compute the freight that would be applicable to that shortage.

(Testimony of Walter G. Hays.)

Q. Could you give us the figure on the amount of the freight that would relate to the lumber that was lost overboard?

A. You mean the freight on the shipments by Guernsey-Westbrook Lumber Company and Blanchard Lumber Company, only?

Q. That is correct.

A. The freight on the shortage on the shipment to Guernsey-Westbrook Lumber Company would amount to \$937.25, and on the shipment by Blanchard Lumber Company, \$26.59.

Q. That is all with that, is it?      A. Yes.

Q. Did you have anything to do with the problem concerning the [56] handling of the lumber following its discharge at Wilmington?

A. Yes. There was a considerable problem there because all the lumber had to be discharged from the Absaroka and the cargo underwriters and owners were interested in realizing the greatest possible amount from the sale of the lumber. In order to do so, it was necessary that I formulate some idea as to the amount of various specifications and grades that would be available. We prepared a list of the various amounts of different specifications and grades and the probable out-turn condition, based upon documents that were placed in our hands by Pope & Talbot, and assisted generally the surveyors and Pope & Talbot in the sale of the damaged lumber at Los Angeles.

Q. Did you have any dealings with a surveyor

(Testimony of Walter G. Hays.)

that came out from New York, to which reference was previously made?

A. Mr. C. N. Banghart, of the firm of Koehler, Camp & Koehler, of New York, came out here as a representative of the War Risk Reinsurance Exchange, and in conjunction with him we worked out these lists showing the totals collected from various specifications and grades that were out-turned, yes.

Q. Were there any particular difficulties involved in the disposition of the lumber that you had not ordinarily been confronted with?

A. Of course, I had nothing to do with the actual sale of the lumber. That was handled by Pope & Talbot. I was aware of certain difficulties, yes. All the lumber from the after hold of the ship was badly oil-stained. There [57] was some difficulty in disposing of that. There was difficulty involved in this way, in that the cargo could not be sold by original lots, because the purchaser in Los Angeles territory would naturally not have the same desire or demand for lumber as the original purchaser on the East Coast. So it was necessary to consolidate lumber of the same description, same grade, same specifications from various different original lots in order to make up a lot that could be sold to anybody in the Los Angeles territory.

Q. Did you make up a rough average statement in connection with different lots?      A. Yes.

Q. Your general average statement would reflect

(Testimony of Walter G. Hays.)

the charges against the carrier, such as the storage charges and other items?

A. The general average statement shows all the handling charges and storage charges, yes.

Mr. Charles: I think that is all.

### Cross-Examination

Mr. Finney: Q. Do you know when the last of the lumber was sold? Would you have that?

A. I have it in other records. It was sold toward the latter part of May.

Q. That was sold in Los Angeles?

A. Yes. The sales of the lumber were completed—the figure that runs in my head is something like 152 different transactions.

The Court: Q. You mean different lots?

A. That's right. [58]

Q. Why was it broken up in different lots? Was it sold at the best advantage in that way?

A. That's right. It had to be segregated as to different conditions. The oil-stained lumber would bring a very low price. There was a relatively small amount there that was practically sound. The Pope & Talbot people tried to sell the badly damaged along with the good lumber where they could do so, to increase the overall result.

### Redirect Examination

Mr. Charles: I want to ask one question which refers to the examination of the other witnesses. I think Mr. Hays knows the fact.

Q. Do you know whether Pope & Talbot has a lumber yard of their own at Wilmington?

(Testimony of Walter G. Hays.)

A. I believe that was one of the main reasons that the cargo owners were willing and anxious to have Pope & Talbot sell the lumber, because all the lumber was actually delivered into Pope & Talbot's own yard, or yards in their control, and from which there were customers to sell and dispose of the lumber to.

Q. Do you know whether they had sales facilities in Wilmington, too?

A. Yes; they have a sales organization in Los Angeles which handled all the sales in this case.

Mr. Charles: That is all.

#### Recross Examination

Mr. Finney: Q. This lumber of Guernsey-Westbrook and Blanchard that is involved in this case was only a small portion [59] of the whole ship-load; Pope & Talbot had a lot of their own lumber on the vessel, too? A. Yes.

Q. Other people's, too?

A. Yes. I understand Pope & Talbot supplied all the lumber. They had some lumber on her, but other shipments had been sold by Pope & Talbot to other purchasers East.

Mr. Charles: If the Court please, we have no further testimony to offer, and I assume that your Honor will permit us to file memoranda of authorities?

The Court: Yes. Mr. Finney, you have the laboring oar.

Mr. Finney: Before we fix the time for the briefs, I was wondering if—it is a little late, but

(Testimony of Walter G. Hays.)

it worries my associate—I should perhaps technically have objected to a question that was asked both of Mr. Kendrick and then again from Mr. Lunny, as to whether or not the terms of the contract, that is, whether it was CIF or otherwise, in any way had any bearing on whether the freight was earned or not. The testimony is obviously parole evidence attempting to vary the written terms of the contract. I did not object, on the theory that I thought the Court would ignore the evidence if it was not material, after examining the contracts, and I think that is the basis your Honor goes on.

The Court: Well, that would be my understanding.

Mr. Finney: Yes. [60]

Mr. Charles: I would have no objection if Mr. Finney wishes to deem the objection made at the time.

The Court: Yes. Let that be the understanding. I think you have expressed it clearly, Mr. Finney. If the Court concludes that the evidence is immaterial, why, it will not be considered for any purpose.

(Discussion regarding briefs.)

Mr. Charles: I wonder if it might be possible for me to recall Mr. Kendrick to ask him one question?

The Court: You have no objection, Mr. Finney?

Mr. Finney: No objection.

## GEORGE KENDRICK,

recalled as a witness by Respondent and Defendant, having been previously sworn, testified as follows:

## Direct Examination

Mr. Charles: Q. Mr. Kendrick, I wanted to ask you about the meaning of the term "CIF". I wanted to know whether that means that you pay the freight, or what the meaning is, as it is used in your trade practice?

A. We don't understand it means we pay the freight.

Mr. Finney: Will my objection go to this?

The Court: Yes. I think that was all explained in the document, itself. Isn't it contained in the document, itself?

Mr. Charles: Yes, there is a definition of CIF.

The Court: Isn't that sufficient to show the court what it means?

Mr. Charles: Q. Is that, in your judgment, as it has been——

The Court: Well, show it to me if there is any question about it. It is understood your objection goes to all of this.

Mr. Charles: Perhaps you can find that.

The Witness: "C.I.F. (Cost, insurance and freight). This term constitutes a sale which includes cost of the lumber, cost of marine insurance on the lumber, and cost of all transportation charges to point of delivery in accordance with ocean bill of lading provisions."

Mr. Charles: My question was whether in such

(Testimony of George Kendrick.)

a sale you, Pope & Talbot, would pay the freight, or whether you would simply arrange for the payment of the freight.

A. Our interpretation of it is we just act as agents for the arranging of the freight and the insurance. When we would make a CIF sale, however, we are obligated to provide the total——

Q. If you ship by another line what form of contract would you use?

A. We use CIF, but the provision for the freight is acting as an agent for the buyer under the terms of bill of lading, as specified in this West Coast form. Is that what you mean?

Mr. Charles: That is all. Thank you, your Honor. [62]

(Briefs to be filed 20, 20 and 10 days, and it was agreed that oral arguments should be made if the Court should inform the attorneys of its desire to have them.)

[Endorsed]: Filed May 10, 1946. [63]

---

[Title of District Court and Causes.]

#### CLERK'S CERTIFICATE

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the following exhibits, Nos. 1, 2, and 3, were introduced at the trial of the above-entitled consolidated cases; that by stipulation and order the reporter's transcript of

testimony at said trial, Exhibit "A," attached to and made a part of answer of respondent in case No. 23992-R; exhibits numbered 1, 2, and 3, attached to and made part of Stipulation for Pre-trial Order in the same case; Exhibit "A," attached to and made part of answer of defendant in case No. 23058-S, and Exhibits 1, 2, 3, 4, and 5, attached to and made part of Stipulation for Pre-trial Order in the same case, are herewith forwarded to the United States Circuit Court of Appeals for the Ninth Circuit, to be considered by it as part of the record on appeal by Pope & Talbot, Inc.

Witness My Hand and Seal at San Francisco,  
this 10th day of May, 1946.

[Seal]

C. W. CALBREATH,  
Clerk.

By /s/ E. H. NORMAN,  
Deputy Clerk.

---

[Endorsed]: No. 11320. United States Circuit Court of Appeals for the Ninth Circuit. Pope & Talbot, Inc., a corporation, Appellant, vs. Guernsey-Westbrook Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed May 10, 1946.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11320

POPE & TALBOT, INC., a corporation,  
Appellant,

vs.

GUERNSEY-WESTBROOK COMPANY,  
a corporation,  
Appellee.

STATEMENT OF POINTS UPON WHICH AP-  
PELLANT INTENDS TO RELY ON THE  
APPEAL

Pope & Talbot, Inc., a corporation, in compliance with Subdivision 6, Rule 19 of the Rules of this Court, hereby adopts and incorporates herein as though set forth in full as the Statement of Points Upon Which It Intends to Rely on Appeal the "Statement of Points Upon Which Appellant Intends to Rely on Appeal" filed in the District Court on April 20, 1946, and set forth on pages 56 to 60, both inclusive, of the Record on Appeal.

/s/ IRA S. LILLICK,  
/s/ LILLICK, GEARY, OLSON &  
CHARLES,

Attorneys for Pope & Talbot, Inc.,  
Appellant.

(Acknowledgment of Service attached.)

[Endorsed]: Filed May 13, 1946. Paul P.  
O'Brien, Clerk.

[Title of C. C. A. and Causes—Nos. 11320 - 11321.]

STIPULATION FOR CONSOLIDATION OF  
CASES ON APPEAL

It Is Hereby Stipulated, subject to the approval of the above entitled Court, that the above entitled action number 11320 at law may be consolidated with the above entitled action numbered 11321 in admiralty, for the purpose of the printing of the Record on Appeal in the Circuit Court of Appeals for the Ninth Circuit and for the purpose of the filing of briefs on appeal in the Circuit Court of Appeals for the Ninth Circuit.

/s/ IRA S. LILLICK,  
/s/ LILLICK, GEARY, OLSON, &  
CHARLES,

Proctors and Attorneys for Pope &  
Talbot, Inc., Appellant.

/s/ FARNHAM P. GRIFFITHS,  
/s/ McCUTCHEN, THOMAS, MATTHEW,  
GRIFFITHS & GREENE,

Proctors for Blanchard Lumber Com-  
pany of Seattle, and  
Attorneys for Guernsey-Westbrook  
Company, Appellees.

It is so ordered.

/s/ CLIFTON MATHEWS,  
United States Circuit Judge.

[Endorsed]: Filed May 14, 1946. Paul P.  
O'Brien, Clerk.

[Title of C. C. A. and Causes—Nos. 11320 - 11321.]

STIPULATION THAT ORIGINAL EXHIBITS  
MAY BE CONSIDERED IN THEIR ORIGINAL  
FORM WITHOUT THE NECESSITY  
OF PRINTING

It Is Hereby Stipulated that Exhibits I to III, inclusive, offered upon the consolidated trial of the above causes on April 27, 1945, Exhibits I, II, III, IV, V attached to the Stipulation for Pre-Trial Order in case numbered 11320 above, and Exhibits I, II and III attached to Stipulation for Pre-Trial Order in case numbered 11321 above, shall not be printed in the Record on Appeal but that all said Exhibits or portions thereof may be considered in their original form and referred to on the appeal by the parties and by the court with the same force and effect as though the same were included in the printed record.

It Is Further Stipulated that Exhibit A attached to and made a part of the Answer of Pope & Talbot, Inc., a corporation, in case numbered 11320, and Exhibit A attached to and made a part of the Answer of Pope & Talbot, Inc., a corporation, in case numbered 11321, shall not be printed but that said exhibits may be considered in their original form as exhibits to the Answer on said appeal by the parties

and by the court with the same force and effect as though the same were included in the printed record.

/s/ IRA S. LILLICK,

/s/ LILLICK, GEARY, OLSON &  
CHARLES,

Proctors and Attorneys for Pope &  
Talbot, Inc., Appellant.

/s/ FARNHAM P. GRIFFITHS,

/s/ McCUTCHEN, THOMAS, MATTHEW,  
GRIFFITHS & GREENE,

Attorneys for Guernsey-Westbrook  
Company, and

Proctors for Blanchard Lumber Com-  
pany of Seattle, Appellees.

It is so ordered.

/s/ CLIFTON MATHEWS,

United States Circuit Judge.

[Endorsed]: Filed May 14, 1946. Paul P.  
O'Brien, Clerk.